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SUPREME COURT, U.S.

83-5940

No. A-348

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

RICHARD KING,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

1. Whether the Florida Supreme Court erred in upholding the finding that Petitioner was competent to stand trial and thereby deny Petitioner due process and equal protection of the law under the Fourteenth Amendment to the United States Constitution and deprive Petitioner of effective assistance of counsel in his defense under the Sixth and Fourteenth Amendments to the United States Constitution.

2. Whether excusing for cause jurors who state they are opposed to the death penalty but can sit and impartially decide the issue of guilt or innocence violates the right to trial by a jury selected from a respective cross-section of the community as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

3. Whether the admission into evidence of written and oral statements obtained after exercise of right to counsel and right to remain silent is a violation of the right to counsel and the privilege against self-incrimination as guaranteed by the Fifth, Sixth and Ninth Amendments and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

4. Whether the admission into evidence of inflamatory photographs not relevant to any issues of the case violates the right to a fair trial by an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

5. Whether the admission into evidence of testimony which had the sole effect to show a propensity toward violent acts or bad character violates the right to a fair trial by an impartial jury as guaranteed by the Sixth and Fourteenth Amendment to the United States Constitution.

6. Whether limiting and restricting Petitioner's cross-examination of key prosecution witnesses violates the right of an accused to be confronted by his accusers as guaranteed by the Sixth and Fourteenth Amendments to the Constitutuion of the United States.

7. Whether the Florida Supreme Court erred in upholding the denial of Petitioner's Motions for Judgment of Acquittal when no prima facie case was established as to the issue of premeditation and thereby denying Petitioner of due process and equal protection under the law and denying Petitioner the right to a fair trial under the Sixth and Fourteenth Amendments to the Constitution of the United States.

8. Whether Florida's death penalty as contained in Florida Statute 921.141 has been applied in an arbitrary and inconsistent manner thereby violating the Fifth, Eighth and Fourteenth Amendments.

9. Whether Florida's policy of according some defendants in capital cases the benefit of a pre-sentence investigation and denying others of this benefit violates the right to due process of law, equal protection of the law, effective assistance of counsel, and the right to be freedom cruel and unsual punishment as guaranteed by the Eighth and Fourteenth Amendments of the United States Constitution.

10. Whether the Florida Supreme Court erred in affirming the imposition of the death penalty when the evidence was found by the Florida Supreme Court to be insufficient to establish that the homicide was committed in a cold and calculated manner and the aggravating circumstances that were upheld by the Florida Supreme Court were not weighed in an even manner thereby resulting in a violation of the Eighth and Fourth Amendments of the Constitution of the United States requirement that the State's power to punish be exercised within limits of civilized standards and the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States.

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TABLE OF AUTHORITIES

below and asserting herein deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the Constitution of the United States provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches, and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Fifth Amendment to the Constitution of the United States provides in relevant part:

> "No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.;

3. The Sixth Amendment to the Constitution of the United States provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed ...; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

4. The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

5. The Ninth Amendment to the Constitution of the United States provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

6. The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> [N] or shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

7. Florida Statutes, Section 921.141 (1982 Supp.) is set forth in Appendix F.

8. Florida Statutes, Section 913.13 (1982 Supp.) is set forth in Appendix G.

9. Rule 3.111, Florida Rules of Criminal Procedure is set forth in Appendix H.

10. Transition Rule 23(a) is set forth in Appendix J.

11. Chapter 79-336, Laws of Florida is set forth in Appendix K.

12. Florida Statutes, Section 90.404(2) is set forth in Appendix L.

STATEMENT OF THE CASE

A. THE FACTS

This case concerns the homicide of Peggy Burnside in Orlando, Florida, on or about August 27, 1979. The victim, Peggy Burnside died of gunshot wounds to the head after apparently being struck on the forehead with a blunt instrument.

The Petitioner was arrested and taken into custody on August 27, 1979, at Daytona Beach, Florida; he had seen news reports of the homicide on TV and had turned himself into the Daytona Beach police.

The Petitioner was given his Miranda warnings several times by Daytona Beach Police Officers and then gave a statement to Daytona Beach Police Officers Power and Sorenson. In that statement, the Petitioner indicated that he had argued with the victim that morning (August 27, 1979) and had struck her with a blunt object. When questioned about shooting the victim, he stated that he did not do it. The Petitioner stated that he did not want to talk about it anymore, and Officer Power didn't pursue it further.

Officer Power called the Orlando Police Department with what information he had.

Orlando Police Officers Cunningham and O'Dell arrived in Daytona Beach and initiated interrogation of the Petitioner. After being given his Miranda warnings again, the Petitioner said that he wanted a lawyer. Officer Cunningham responded that they only wanted to talk to him about what the detective from Daytona Beach had talked to him about. The Petitioner was then questioned

and responded with incriminating statements allegedly indicating that he had shot the victim twice. At one point during the interview, Officer Cunningham attempted to tape record the Defendant's statement. The Petitioner again stated that he wanted an attorney present. Officer Cunningham responded that this taping was just to make a permanent record of what he had told them; the interrogation continued.

Search warrants were obtained by Orlando Police Officer Barrett mainly on the basis of the Defendant's statements in Daytona Beach. Various pieces of evidence (a .38 caliber revolver, holster, several knives, a piece of pipe and others) were obtained from the Petitioner's residence, which was also the location of the homicide.

The State's case in chief was purely circumstantial. Various witnesses testified to the relationship the victim had with the Petitioner, to the fact that the victim was seeking a divorce from her husband, Milton Burnside, and to the victim's itinerary for several days prior to the homicide. Also, the fact of an alleged beating of the victim by the Petitioner some 23 days prior to the homicide was brought out. The itinerary of the Defendant for several days prior to his arrest was testified to, as were the statements he made to the various police officers after his arrest. Numerous vivid and gruesome photographs of the victim were introduced by the State, in addition to putting into evidence the physical objects obtained by the search warrants.

The Petitioner testified in his own behalf, denying that he had shot the victim.

The trial lasted for approximately ten days, at the conclusion of which the jury returned a verdict of guilty to murder in the first degree.

B. TRIAL PROCEEDINGS

Indictment was returned on September 14, 1979, charging the Petitioner, RICHARD KING, with murder in the first degree of Peggy Burnside (R. 2081).

Numerous pre-trial motions were filed and heard between September 27, 1979 and time of trial on June 9, 1980.

Jury trial began on June 9, 1980 and lasted until June 19, 1980 (R. 1-1314), at which time the jury returned a verdict of guilty as charged (R. 2574).

Penalty phase of the trial was conducted on June 30, 1980 (R. 1405-1568), at which time the jury returned an advisory recommendation of death (R. 2589).

Sentence of death was imposed on July 2, 1980 (R. 2594), at which time the trial court entered its findings (R. 2630).

Notice of Appeal was filed on July 8, 1980 (R. 2610).

C. THE APPEAL

On direct appeal to the Supreme Court of Florida, Petitioner claimed that the trial court erred in finding him competent to stand trial and thereby violated his Sixth and Fourteenth Amendment rights. (Appellate Brief at 5-6). Petitioner also urged that in excusing for cause jurors who stated they were opposed to the death penalty, but who could sit and impartially decide the issue of guilt or innocence, the trial court violated his right to trial by a jury as guaranteed by the Sixth and Fourteenth Amendments. (Appellate Brief at 7-11). Petitioner alleged that the trial court, contrary to this Court's decision in Edwards v. Arizona, 101 S.Ct. 1880 (1981), unconstitutionally admitted into evidence written and oral statements after Petitioner exercised his right to counsel and his right to remain silent. (Appellate Brief at 12-19). Petitioner also claimed that the admission into evidence by the trial court of inflammatory photographs violated his Sixth and Fourteenth Amendment rights by denying him a fair trial by an impartial jury (Appellate Brief at 20-21). Petitioner claimed that the admission into evidence by the trial court of testimony which had the sole effect to show the propensity toward violent acts or bad character violated his Sixth and Fourteenth Amendment rights by denying him a fair trial by an impartial jury (Appellate Brief at 22-24). Petitioner alleged that the trial court unconstitutionally limited and restricted the right of Petitioner to cross-examine key prosecution witnesses (Appellate Brief at 25-27). Petitioner also claimed that the trial court erred

in failing to grant his motions for Judgment of Acquittal, there being no showing of a prima facie case on the issue of premeditation. (Appellate Brief at 28-32). Petitioner urged that the trial court erred in imposing the penalty of death upon him in that the Florida Statute under which such penalty was imposed is unconstitutional. (Appellate Brief at 33-36). Petitioner also claimed that the trial Court's denial of a pre-sentence investigation report violated his Eighth and Fourteenth Amendment rights by denying him due process of law, equal protection under the law, effective assistance of counsel, and the right to be free from cruel and unusual punishment (Appellate Brief at 37-38). In addition, the trial court erred in its findings of aggravating circumstances and therefore unconstitutionally applied the death penalty. (Appellate Brief at 39-43).

The Supreme Court of Florida found none of these issues had any merit and disposed of six issues summarily. King v. State, 436 So.2d 50 (Fla. 1983); Appendix A. Regarding the trial court's admission into evidence of Petitioner's statements after his Miranda rights were given, the Supreme Court recognized that the admissibility of the statements presented a close question, but concluded that:

> [T]he Appellant gave the statement to the Orlando Police officers voluntarily, with full knowledge of his rights to counsel, and with knowledge that, by giving the statement under the circumstances, he was waiving his right to counsel.

Id. at 54; Appendix A. The Supreme Court also stated that:

> [E]ven had the trial court excluded these statements the admissions appellant had made to the Daytona Beach police, combined with the other evidence in the case, clearly established appellant's guilt. The trial court's error, if any, was harmless....

Id. Appendix A.

The Supreme Court of Florida found one of the three aggravating circumstances relied on by the trial court to be without sufficient evidence to establish that this homicide was committed in a cold and calculated manner. But the Court found that resentencing was not required as two aggravating circumstances remained and no mitigating circumstances were found.

Regarding the competency of the Petitioner, the Court noted that three psychiatrists examined the Petitioner and found him sane and competent to communicate, advise, and assist counsel. In addressing the propriety of excusing jurors who stated that they were opposed to the death penalty but could sit impartially on the issue of guilty or innocence, the Court noted that this issue had been previously resolved by Supreme Court of Florida in King v. State, 390 So.2d 315 (1980), cert. denied, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981). The Court found no impropriety in the trial judge's excusing the jurors in this case. The Court found that neither the admission of the photograph of the victim nor the asserted restriction on the cross-examination was reversible error. The Court also found the evidence was clearly sufficient to establish premeditation and Florida Statute 921.141 to be facially constitutional and constitutional as applied in this case.

The Supreme Court of Florida affirmed the conviction and sentence of death. The Supreme Court of Florida denied Mr. King's petition for rehearing.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER FAILURE TO FIND PETITIONER INCOMPETENT TO STAND TRIAL VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS.

The record is replete with instances in which the Petitioner evidenced various indications of mental disorder; the Petitioner refused to wear civilian clothes at the trial (R. 17, 18). the Petitioner asserted that he is "black" (R. 210) (R. 1478), when in fact he is Caucasian; the Appellant insisted on testifying at the sentencing hearing and then asserted a Fifth Amendment privilege (R. 1521-1523) and the Petitioner exhibited bizarre physical behavior in front of the jury during the course of the trial (SR filed). Further, the Court noted the Petitioner's "mental condition" and denying Petitioner's Motion to Represent Himself (R. 19), Petitioner counsel noted his observation of mental "deterioration" prior to the trial (R. 26), and the testimony of Dr. Edmund Bartlett, Ph.D. in

clinical psychology, indicated mental disorder (R. 1510-1512), and that the Petitioner "was not quite as much in touch as I had initially believed" (R. 1516), (also see, R 2438-2441).

The cursory examination by Dr. Robert G. Kirkland on June 10, 1980, stated that the Petitioner would not discuss the case nor his background with him. Dr. Kirkland then made the conclusion that the Petitioner "is at presently legally SANE, and mentally competent to stand trial" (R. 2535). The examination by Dr. E. Michael Gutman on June 10, 1980, revealed the Petitioner to be "legally SANE, and able to know right from wrong" (R. 2536). I would submit that "sanity" and "knowing right from wrong" was not the criteria at the time of this examination; rather, the Petitioner must be able to possess "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or he must be able to possess "rational as well as factual understanding of the proceedings against him." Chapter 79-336, Laws of Florida, and Transition Rule 23(a).

The record indicates much difficulty in communication between the Petitioner and his attorney; dialogue in the Appellant's Motion to Withdraw (R. 1391-1396), dialogue in Petitioner's Motion to Represent Himself (R. 3-7), letter of June 10, 1980, from Dr. Gutman to Judge Keating (R. 2536), request in Court by Petitioner (R. 920-921) (R. 209-216), Petitioner's Statement in Court (R. 797), and the observation of Petitioner's co-counsel, Glenn Klausman, (SR filed).

In that the Petitioner lacked the necessary ability to communicate effectively with his counsel and could not aid in the preparation and defense of his case, in that this ability is necessary under the criteria for competency to stand trial under Florida Law existent at the time, in that Dr. Kirkland and Dr. Gutman applied a different criteria to determine the competency to stand trial, and in that there is substantial evidence of mental disorder of the Petitioner, the Petitioner was denied due process and equal protection of the law under the Fourteenth Amendment to the United States

Constitution, and further, the Petitioner was deprived of effective assistance of counsel in his defense under the Sixth and Fourteenth Amendments to the United States Constitution. Accordingly, the Court should grant certiorari to determine whether the failure to find Petitioner incompetent to stand trial violated the Sixth and Fourteenth Amendments.

II.

THE COURT SHOULD GRANT CERTIORARI BECAUSE THE FLORIDA SUPREME COURT'S EXCLUSION OF PROSPECTIVE JURORS WHO ARE OPPOSED TO THE DEATH PENALTY BUT CAN SIT AND IMPARTIALLY DECIDE THE ISSUE OF GUILT OR INNOCENCE IS UNCONSTITUTIONAL AND CONFLICTS WITH THE SIXTH AND FOURTEENTH AMENDMENT REQUIREMENTS FOR JURY SELECTION SET OUT IN DECISIONS OF THIS COURT.

It is now well settled that a prospective juror in a capital case may not be excused for cause as a result of his general opposition to the death penalty. The decisions of this Court have made it clear that a juror may not be excused for cause in such a case because of his views on the death penalty unless those beliefs would interfere with his ability to follow the law applicable to the case. Witherspoon v. Illinois, 391 U.S. 510 (1968), Boulden v. Holman, 394 U.S. 478 (1969) and Maxwell v. Bishop, 398 U.S. 262 (1970). If only one venireman was improperly excused for cause because he voiced general objections to the death penalty, the death sentence cannot be carried out. Davis v. Georgia, 429 U.S. 122 (1976).

Petitioner respectfully submits that the voir dire procedure used in his trial fails to meet the minimum Constitutional standard set by this Court for jury selection in capital cases.

The trial court excused for cause juror Kimble (R. 84,85) at the request of the State (R. 69), juror Farmer (R. 84,85) at the request of the State (R. 69), juror Grimes (R. 105,107) at the request of the State (R. 104), and juror West (R. 105, 107) also at the request of the State (R. 105). Jurors Farmer, Kimble, and West each stated that they would be able to sit and decide impartially the question of guilt or innocence but that they were opposed to the imposition of the death penalty (R. 75, 76), (R. 62, 63, 74, 80, 81) and (R. 102) respectively. Juror Kimble stated that his

objection was for religious reasons (R. 62, 63,80, 81); further, that he might be able to render a recommendation of the death penalty after hearing the witnesses (R. 62, 63). Juror Grimes was somewhat equivocal in her statement, but did believe she might be able to sit and impartially decide the issues of guilt or innocence even though she was opposed to the death penalty (R. 101).

The State used up all ten of its allotted peremptory challenges to the venire, (R. 275, 276).

Section 913.13, Florida Statutes entitled "Jurors in Capital Cases" provides:

> A person who has beliefs which precludes him from finding a defendant guilty of an offense punishable by death shall not be qualified as a juror in a capital case.

Section 913.13, is the sole Statute specifically governing the qualifications of jurors in capital cases. The Statute requires impartiality of trial jurors in capital cases only as to deciding the Appellant's guilt or innocence (Chapter 913 is entitled "Trial Jury. Thus, the only relevant inquiry is whether a prospective trial juror will be impartial as to Petitioner's guilt or innocence. Inquiry regarding a juror's attitude toward the death penalty becomes relevant only after the trial jury has returned a verdict of guilty of Capital Murder. Following the return of such a verdict, inquiry into the juror's attitude toward's the death penalty would become appropriate. Jurors who could not follow the law regarding a recommendation of death or life would not be qualified to sit on the advisory sentence jury. Such jurors (or the entire trial jury) would be subject to replacement by special jurors pursuant to Section 921.141(1), Florida Statutes:

> If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the defendant, the trial judge may summon a special juror or jurors as provided in Chapter 913 to determine the issue of the imposition of the penalty.

See also Portee v. State, 253 So.2d 866 (Fla. 1971), which prohibits challenges for cause against jurors who have reservations about capital punishment which would not effect their verdict in any manner.

Additionally, it is submitted that if jurors are excluded who state in advance of trial that they would not consider recommending the death penalty, such a jury would be less than neutral with respect to guilt.

> The question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence - given the possibility of accomodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment. That problem is not presented here, however, and we intimate no view as to its proper resolution. Witherspoon v. State of Illinois, 391 U.S. 510, 520 N. 18 (1968).

The exclusion of prospective jurors who might not vote for the imposition of the death penalty is improper and unconstitutional and inconsistent with the Fourteenth Amendment requirements for capital-case jury selection as laid down in Witherspoon v. Illinois, (supra); Maxwell v. Bishop, 398 U.S. 262 (1970); Boulden v. Holman, 394 U.S. 478 (1969); Mathis v. Alabama, 91 S.Ct. 2278 (1971); and Davis v. Georgia, 50 L.Ed.2d 339 (1976).

These challenges for cause violate the Petitioner's right to trial by a jury selected from a respective cross-section of the community, as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States. These challenges for cause violate the Petitioner's Fourteenth Amendment rights to equal protection and due process of the laws by denying him a trial by a jury selected from a representive cross-section of the community, without furthering any permissible State interest, since:

1. The jury does not finally impose sentence.
2. Its advisory sentencing verdict occurs at the second state of the bifurcated trial.
3. This verdict is rendered by a majority vote.

This practice subjects the Petitioner to trial by a jury which is not impartial, but in fact is biased in favor of the prosecution of the issues of the Petitioner's guilt and of the degree of the crime of which he is charged, in violation of the Fourteenth Amendment to the Constitution of the United States.

This practice subjects the Petitioner to cruel and unusual punishment as prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States because the jurors that will be selected for trial will be incapable of performing the functions demanded by Woodson v. North Carolina, 428 U.S. 280 (1976) of "maintaining a link between contemporary community values and the penal system" (also see, Gregg v. Georgia, 428 U.S. 153, (1976).

Without question, persons opposed to the imposition of the death penalty, comprise a fair cross-section of the community, Gregg v. Georgia, (supra), exclusion of such jurors would be constitutionally impermissible. This would be in violation of the Petitioner's Sixth Amendment right to a jury trial in that the requirement that a petit jury be impartially drawn from a representative cross-section of the community. Taylor v. Louisiana, 419 U.S. 522 (1975); Hernandez v. Texas, 347 U.S. 425 (1954); Theil v. Southern Pacific Company, 328 U.S. 217 (1946); Smith v. Texas, 311 U.S. 128 (1940).

Furthermore, it should be noted that in applying Witherspoon v. Illinois, (supra), to the statements of juror Kimble (R 62,63) it is impermissible to exclude juror Kimble for cause. As stated in Witherspoon v. Illinois, (supra):

> .....it can not be assumed that a juror who describes himself as having 'conscientious or religious scruples' against the infliction of the death penalty or against infliction 'in a proper case' thereby affirms that he could never vote in favor of it or that he would not consider doing so in the case before him. Obviously many jurors 'could, not withstanding their conscientious scruples (against capital punishment), return (a) verdict of death and make their scruples subservient to their duty as jurors'.....Thus a general....question as to the presence of reservations or scruples is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direst cases.....Unless a venireman states unambigously that he would not automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position.

Also see, King v. State, 390 So.2d 315 (Fla. 1980), Witt v. State, 342 So.2d 297 (Fla. 1977).

It should be further noted that Petitioner's attorney interposed objections at the appropriate time (R 69,82,83,105).

The procedure adopted in this case and approved by the Florida Supreme Court below, is clearly at odds with the principles set forth in Witherspoon, supra. The exclusion for cause of prospective jurors simply because of their views as to the imposition of the death penalty constitutes a plain violation of the Sixth

and Fourteenth Amendment.

III.

THE COURT SHOULD GRANT CERTIORARI BECAUSE THE ADMISSION OF THE WRITTEN AND ORAL STATEMENTS OBTAINED FROM PETITIONER CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND THIS COURT'S INTERPRETATIONS OF THE FIFTH, SIXTH, NINTH AND FOURTEENTH AMENDMENTS.

The written and oral statements were obtained from the Petitioner in violation of his right to counsel and his privilege against self-incrimination guaranteed by the Fifth, Sixth and Ninth Amendments and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, Miranda v. Arizona, 86 S.Ct. 1602 (1966), as well as guaranteed by Rule 3.111 RcrP. The written and oral statements obtained from the Petitioner were not freely and voluntarily given, in violation of his rights guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Further, the written and oral statements were obtained from the Petitioner in violation of his right to be free from unreasonable searches and seizures guaranteed by the Fourth and Fourteenth Amendments of the United States Constitution. The written and oral statements were obtained from the Petitioner in violation of his rights secured by Rule 3.131 RcrP, and Gerstein v. Pugh, 95 S.Ct. 854 (1975).

The factual basis for this point of error is best covered by a full review of the record as to the facts . In his testimony at trial, Officer Cunningham indicated that Richard King was a suspect of a homicide (R 758). Testimony at trial of Sergeant O'Dell indicated that both he and Sergeant Cunningham had gone to Daytona Beach to interview Richard King, who was in custody, and were there to talk with him about this particular crime (R 785, 787, R 1322). In deposition both Cunningham and O'Dell indicated that at the beginning of the interview they told the Petitioner what they were there for, Sergeant O'Dell indicating that the first thing they told the Petitioner was that they were there to talk about "Peggy" (R 1872,1813, 1814). At a hearing on Motion to Suppress brought by the defense, Officer Cunningham indicated to the defendant at the beginning of the interview that they were there for what had happened that morning (indicating the homicide in Orlando) (R 1354). It should be noted here that the Defendant was in custody and was the focus of a homicide investigation; further, that the Daytona Beach police had received in-

formation over their teletype from Orlando that this individual was wanted in connection with a homicide. (R 1571).

Circumstances concerning the defendant at the time of the interview, both with Daytona beach Police officers and with Orlando Police Department officers, should also be noted. The initial interview with Detective Power of Daytona Beach occurred in a jail room and lasted some 45 to 55 minutes (R 1329), and occurred in an interview room in the jail approximately 8 by 8 feet or 10 by 10 feet in dimension (R 1333). There was approximately a ten to fifteen minute break after this initial interview with Detective Power, at which time another interview was initiated by Detective Power in his office. This interview lasted approximately one to one and a half hours (R 1330), and took place in a 6 by 7 or 7 by 8 foot room (R 1334). During the second interview, Officer Sorenson of Daytona Beach was also present, was in uniform, and was in possession of his firearm (R 1330,1597). Petitioner was described as being "very nervous", emotional and crying, especially about the victim's death and their relationship with each other (R 1334). Officer Sorenson also noted that the Petitioner stated that he had a seventh grade education and appeared to him, (Officer Sorenson), to not be very well educated (R 1597).

When the Interview was completed with the Daytona Beach Officers, the Petitioner was taken back to the jail section, and was then taken to an interview room in the jail section and questioned by the Orlando Police Officers, Cunningham and O'Dell. The Appellant had been advised of his Miranda rights by Officer Power, (R 1323) and was then readvised of his Miranda rights by Officer Cunningham (R 760-763, 787, 1871, 1813). It should be noted that at the conclusion of the interview with Detective Power from Daytona Beach, the Petitioner stated that he did not want to talk about it anymore. Detective Power indicated that he did not pursue the issue at that point, and that was when the interview concluded with Detective Power. (R 729).

After the initial statements by the Orlando Police Officers as to why they were there, and after having been advised of his Miranda rights by those officer, Petitioner chose to exercise his right to counsel. The testimony at trial of Officer Cunningham revealed the following in response to questioning:

Q. After you advised the defendant of his constitutional rights, what occurred, sir?

A. As I was starting the interview, he said to me, he, "I think I need an attorney."

And at which time I responded, "we're only here to talk to you about what the Detective from Daytona Beach talked to you about." (R 763)

(It should be noted that at this time, Officer Cunningham had not talked with Power as to these events, other than discussions over the phone). The testimony of Sergeant O'Dell at trial indicates the following:

Q. And isn't it correct that at the beginning of the interview, the defendant expressed the desire to have an attorney present?

A. Yes, sir, he did. (R 792)

Depositions taken of Officer Cunningham indicate that the Petitioner said he would like to talk with an attorney first,... and then at the time I responded, that they were only there to talk with him about what the Daytona Beach Officer had talked to him about (R 1872). Also, deposition revealed that when the Orlando Police Officers walked into the room, and read the Petitioner his rights, the Petitioner said, "I want to talk to an attorney first" (R 1887, 1889). At some point in the interview discussion was made as to taping a statement. The Petitioner again stated that he wanted an attorney, with the response from the Orlando officers that the only reason that the tape was being made was to have a permanent record of it, and at that point the Petitioner said that he didn't want to talk about the incident (R1887). At deposition, Sergeant O'Dell indicated that he recalls the Appellant also desiring an attorney, and that Officer Cunningham's response was that they only wanted to talk to him about what the Daytona Detective had talked to him about. (R1813).

At the hearing on the Motion to Suppress Confessions, Officer Cunningham indicated a series of events. That right after the Petitioner's rights were read to him, the Petitioner was told what the officers were there for, the Petitioner then said, "I think I need an attorney." The response was, that they were ther to talk to him about what the Daytona Beach Detective had talked to him about. Officer Cunningham indicates ihat this was before the incriminating admission was made (R 1336, 1354). Also during this hearing, Officer Cunningham indicated that before the tape segment of the interview, the Petitioner stated again that he would like to have an attorney present, again this was followed by the response that the tape was only there to make a

permanent record (R 1356). As to this later tape recorded segment of the interview with Officers Cunningham and O'Dell, the Petitioner in in answering questions stated:

Q. Could you tell us what happened?

a. I'd rather not discuss that; anything else?

Q. Is it alright if I ask the questions?

A. (No answer)

Q. Okay, let me ask....

A. Not related to that, not related to the argument, not what happened. I'll answer any other questions.

Q. Excuse me?

A. I'll answer any other questions. (R 2319)

In addition, the Petitioner stated at least six more times during this taping that he did not want to discuss it. (R 2319,2320). (During the tape recorded section of interview with Officer Power of Daytona Beach, the Petitioner expressed a desire not to discuss it numerous times).

In spite of this, the Court denied defense's Motion to Supress Confessions and Admissions and at trial the incriminating statements the Petitioner made, indeed the only statements indicating confession for this homicide, came into evidence (R 766-787). This testimony was admitted over Petitioner's time objection. (R 765,770, 787)

During the interview conducted by Officers Cunningham and O'Dell, the following description indicates the Petitioner's mental state at the time. The interview with the Orlando officers lasted some 45 minutes during which the Petitioner had mist (tears) in his eyes, his hands were trembling, and he was nervous (R 780,1347). Sergeant O'Dell described the Petitioner as being extremely nervous, and also remorseful (R 792). This interview was conducted at the jail section in Daytona Beach, and the rooms can be described as being somewhere between 8 by 9 feet or 10 by 12 feet in dimension (R 1880, 1813). Detective Cunningham described the Petitioner as being nervous, very quiet, and had to be asked several times to speak up (R 1347, 1892). The Petitioner was also described as ringing his hands being nervous and upset (R 1347). Detective Cunningham also indicated, as to Petitioner's condition, that he (The Petitioner) was under a little stress with two investigators coming to talk to him (R 1355).

"Custodial interrogation" within the meaning of the Miranda decision means the questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way; United States v. Montos, 421 F.2d 215 (1970). United States v. Massey, 550 F.2d 300 (1977), noted:

> Where a request is made for an attorney prior to any questioning, finding of a knowing and intelligent waiver of the right to an attorney is impossible if the request for an attorney is disregarded and questioning proceeds, any statements taken thereafter cannot be the result of the waiver, but must be presumed to be a product of compulsion, subtle or otherwise....If an individual states that he wants an attorney, interrogation must cease until an attorney is present; at that time the individual must have an opportunity to confer with the attorney, and to have him present during any subsequent questioning.

Further, it was stated in United States v. Hernandez, 574 F.2d 1362 (1978):

> .....erroneous admission of an incriminating statement, obtained from the defendant after failing to scrupously honor his invocation of rights following a former Miranda warning, could not be considered harmless beyond reasonable doubt even though there appeared to be ample basis other than the statements to sustain the conviction, where statements carried extreme probative weight in relation to crimes for which Petitioner was convicted and may have represented overpowering, inescapeable evidence for the jury.

In Wainwright v. Sykes, 528 F.2d 522, (1976), the Court found that:

> Any incriminating statement made by the Defendant absent a knowing and intelligent waiver of his right of counsel and his right not to incriminate himself, must be excluded from the evidence at trial.

Further:

> A waiver of Miranda rights will not be presumed from a silent record.

In Shriner v. State, 386 So.2d 525 (Fla. 1980):

> The Supreme Court does not approve of any practice by which suspect's express desire to remain silent as to some specific activity is aborted by subterfuge of questioning which is designed or intended to indirectly gain information about those matters which he has indicated he wishes not to discuss... If law enforcement officers fail to give specified Miranda guidelines during interrogation, statements thus derived may be suppressed, even though otherwise wholly voluntary.

In State v. Prosser, 235 So.2d 740 (Fla. 1st DCA 1970), the Court noted that it was a violation of a defendant's Miranda rights for the State to elicit and use a confession subsequent to the

defendant desiring an attorney. In that case the defendant was asked, "Do you want a lawyer?" Response was, "I probably need one". This response was made several times, after which the defendant then made incriminating statements. The trial court correctly suppresssed the statements.

The controlling case concerning the above point of error is that of Edwards v. Arizona, 101 S.Ct. 1880 (1981). In that case, this Court indicated that State Court would be in error if they applied a "standard for determining waiver of right to counsel by focusing on the voluntariness of the confession, rather than on whether the defendant understood his right to counsel and intelligently and knowingly relinquished it." Further, this Court found that "where a defendant had envoked his right to have counsel present during custodial interrogation, valid waiver of that right could not be established by showing only that he responded to police-initiated interrogation after being again advised of his rights; thus, use of defendant's confession against him at his trial violated his rights under the Fifth and Fourteenth Amendments to have counsel present during custodial interrogation. Once an accused has expressed his desire to deal with police only through counsel, he is not to be subjected to further interrogation until counsel has been made available to him unless accused himself initiates further communication with police."

The record clearly reveals that the police officers were there on a self-serving mission. They did not need to speak to the Petitioner to find out what Petitioner had told Detective Power. All they had to do was talk to Power himself for that information. No, their only purpose in mentioning this was to use it as a subterfuge to get Petitioner to start talking.

Their was nothing "voluntary" about Petitioner's actions or conversation. He was in custody, had exercised his rights to silence and to have an attorney numerous times, only to be told by the Orlando Police officers that they only wanted to talk about his conversation with Detective Power and the fact that they needed to make a tape recording ("just for a permanent record"). Petitioner was rebuffed each time he asserted his rights and was interrogated by the Orlando Police officers for a lengthy period of time.

It is patently clear when reviewing the record that the Orlando Police officers went into the room at the Daytona Beach

Police Station for the sole intent of furthering their investigation into a homicide in which Petitioner was the prime suspect. It is also clear that their officers ignored or turned aside Petitioner's requests to have his rights observed. And finally, it is evident that there was no voluntary "statement" given. For upwards of an hour the Orlando police officers questioned Petitioner (going far beyond the scope of a statement they originally made about Petitioner's conversation with Detective Power). Such actions by the police are unexcusable and according, the Court should grant certiorari to bring this case in line with the controlling case of Edwards, (supra).

IV.

THE COURT SHOULD GRANT CERTIORARI BECAUSE THE ADMISSION OF CERTAIN CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT REGARDING THE SIXTH AND FOURTEENTH AMENDMENTS AND THEIR REQUIREMENTS FOR A FAIR TRIAL BY AN IMPARTIAL JURY.

A.

THE ADMISSION INTO EVIDENCE OF INFLAMATORY PHOTOGRAPHS NOT RELEVANT TO ANY ISSUES OF THE CASE VIOLATES THE RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS.

The state moved to introduce an item marked State's "Q" for identification during the testimony of Dr. Kessler, Medical Examiner (R 376-382) and the trial court received it into evidence as State's Number "10" (R 386). Counsel for the Petitioner objected (R 376,377,382-385).

State's Number "10" depicts a frontal view of the victim after she had been rolled over from the position in which she was found. There was no relevance in admitting this photograph into evidence; the purpose could only have been to inflame the passions and icrease the prejudice of the jury against the Petitioner. In Mardoff v. State, 196 S. 625 (Fla. 1940), the Court noted the facts in that case were that the photographs which were somewhat gory of the murder victim, had been taken before anyone had touched the body. There evidently was another photograph taken in which the body had been slightly moved but this was to show the weapon which caused the death and said weapon had been left in the body of the victim. The Court has also noted in Swann v. State, 322 So.2d 485 (Fla. 1975), that gruesome and gory photographs may be admitted if they properly depict factual conditions relating to a crime, and

further, they should be admitted if they are relevant in aiding the court and jury in finding the truth. But the court also notes that photographs serving only to create passion should be rejected. In State v. Wright, 265 So.2d 361 (Fla. 1972), the Court noted that allegedly gruesome and inflamatory photographs, each of which depicted a wound or wounds on the body of a murder victim not depicted by the other pictures, were relevant and admissable. This court also noted that inflammatory photos are admissable into evidence if they are relevant to prove any issue required to be proven in the case.

The testimony of Dr. Kessler (R 368-374) (R 398-402), and State's Exhibits Number "11", "12", "18", "19" and "20" adequately describe and depict the wounds to the victim in issue to this case, specifically any wounds to the frontal area of the victim and/or the frontal area of the victim's face.

In that this photograph, State's Exhibit Number "10", was not relevant to any of the issues to be proven in this case, the court erred in admitting this photograph into evidence.

By inflamming the passions of the jury, and by causing prejudice to be directed toward the Petitioner, the Petitioner was denied his right to a fair trial by an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

B. THE ADMISSION INTO EVIDENCE OF TESTIMONY WHICH HAD THE SOLE EFFECT TO SHOW A PROPENSITY TOWARD VIOLENT ACTS OR BAD CHARACTER VIOLATES THE RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS.

Counsel for the Petitioner moved to exclude (R527) testimony of Mae Guantt (R 539-544), and objected when she did so testify (R539,540), concerning the alleged beating of the victim by the Petitioner some twenty-three days prior to the homicide issue. Basis for this exclusion was that it was too remote in time to the incident for which the Petitioner was on trial, Barwicks v. State, 82 So.2d 356 (Fla. 1955), and that it only could be constructed to show bad character of or propensity toward violent acts by the Petitioner, Williams v. State, 110 So.2d 654 (Fla. 1959), Florida Evidence Code 90.404(2).

The State relied on using this testimony to show premeditation on the part of the Petitioner (R 530), in that a showing of prior hostility or difficulty would infer premeditation (R 531). In order to use prior hostility or difficulty to infer premeditation,

there must be shown that there was also an absence of provocation. No where in the record is this absence of provocation reflected.

The prosecution stated (R 539) that this testimony went "beyond the Williams Rule", however, absent a showing of no provocation to allow prior hostility or difficulty to infer premeditation, the only purpose this testimony could serve would fall under the Williams Rule. In that none of the admissible areas (identity, etc.) under the rule, Evidence Code 90.404(2), were relevant to the issues at trial, the sole effect of the testimony was to show propensity toward violent acts or bad character. In Davis v. State, 376 So.2d 1198 (Fla. 2d DCA 1979), that court found that even where identity is the material issue, such testimony of a collateral crime is not admissible unless there is more than a mere similarity between two crimes, and that there must be something unique about the perpetrators themselves or their modus operandi before the testimony can be received into evidence. In the case at hand, there is insufficient similarity between an alleged beating and the causing of a homicide by gunshot. In Marion v. State, 287 So.2d 419 (Fla. 4th DCA 1974) the Court stated:

> We deemed the underlined words to be the ess ntial determinative standard, i.e. relevant, that is to say, "to prove a fact and issue in the case before the Court." If there is not fact "in issue" there is no relevancy and the collateral evidence should not be admitted.

The alledged prior conduct of the Petitioner was, in addition to the above-stated grounds, too remote in time for the Court to allow the jury to consider it. In Barwicks v. State, (supra), the trial court properly excluded the evidence of a violent incident some two or three weeks prior to the occurence of the homicide being tried.

> The Court thereupon refused to allow the testimony "for the reason that it was too remote and they lived together ever since the time of the first encounter"....The trial judge properly excluded the testimony for the reason that it was too remote to have any reasonable materiality to the subject of creating in the Appelant's mind, as he contended, "the presence of eminent danger to himself at the hands of the deceased" at the time of the homicide. Remoteness is established not only by the passage of time but also by the admitted intervening fact that the Appellant and the deceased resided together continuously between the time of the prior altercation and the time of the homicide. Obviously, the prior altercation could not have created in the mind of the Appellant any concern as to his own safety while in the company of the deceased.

Here, in Barwicks v. State, (supra), the Appellant would have benefited from the testimony of the prior incident, not the State; furthermore, the Court noted that intervening factors had also occurred - the Appellant and the deceased had continued in their relationship after the first incident. This is similar to the factual situation in the case at hand; the Petitioner and the deceased also continued to see each other in their relationship (R 1680, 1685) (R 684, 686) after the alleged beating incident.

In that the Florida Supreme Court allowed the testimony to come into evidence to be considered by the jury, the Petitioner was denied his right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution.

V.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE LIMITING AND RESTRICTING PETITIONER'S CROSS-EXAMINATION OF KEY PROSECUTION WITNESSES VIOLATES THE RIGHT OF THE ACCUSED TO BE CONFRONTED BY HIS ACCUSERS AND CONFLICTS WITH THE SIXTH AND FOURTEENTH AMENDMENTS REQUIREMENTS FOR CROSS-EXAMINATION AS SET OUT IN DECISIONS OF THIS COURT.

The trial court improperly granted State's Motion in Limine (R 594), over objection of Petitioner's counsel (R 586-593), excluding Petitioner's inquiry into Milton Bernside, husband of the victim in this case, exercising the Fifth Amendment privilege of the right to remain silent at his deposition taken on December 10, 1979, and additionally the Court excluded inquiry into Milton Bernside refusing to talk to the police on August 27, 1979. In that Mr. Bernside and the victim had been experiencing marital difficulties (R 561,605,608,640) at the time of and immediately prior to the homicide, he was a highly likely alternative suspect in the case. Petitioner's counsel proferred Mr. Bernside's testimony in these areas (R 647-652) and obtained admission by the witness Bernside during the profer that he exercised the Fifth Amendment priviledge on December 10, 1979 at the deposition (R 648) and again, that he, on August 27, 1979, declined at the scene to answer Police questions regarding the homicide.

Petitioner's cross-examination of Mae Gauntt was restricted when she was questioned on whether or not certain bullet fragments had been moved or were in their original position, at the scene of

the homicide (R 882). This followed questioning by the State concerning paths that the bullets may have taken, and the location, at the homicide scene, or certain bullet holes (R 875-880).

The Court has found previously in Johnson, et ux v. Reynolds, et al, 121 S. 793 (Fla. 1929), that:

> In the cross-examination of a witness, great latitude is allowed that it may be shown what the witness opportunity for observation were and his disposition to speak truthfully and the ability to speak accurately ....But whenever counsel is within his rights and is seeking by the examination of a witness in cross to bring a helpful light upon the subject of the inquiry, it is harmful error to deny him the right. Under certain circumstances the limits to which a cross-examination may extend may not well be defined.

The Court has also noted in Coco v. State, 62 So.2d 982 (Fla. 1953), that:

> A fair and full cross-examination of the witness upon a subject opened by direct examination is an absolute right not a privilege...especially in a criminal case wherein the defendant is charged with murder in the first degree.

It should be noted that this Court found that:

> The right of cross-examination has its roots in the constitutional guarantee that an accused shall have the right to be confronted by his accusers.

And further, the Court noted that:

> Cross examination is not confined to the identical details testified to in chief but extends to the entire subject matter of such testimony and all matters that may modify, supplement, contradict, rebute, or make clear the facts testified to in chief by a witness on cross-examination.

The exposure of a witness' motivation in testifying is a proper function of the Constitutionally protected right of cross-examination. Biased or prejudiced of a witness has an important bearing on his credibility and tending to show such bias is relevant. Any evidence which tends to establish that a witness is appearing for the State for any reason other than merely to tell the truth should not be kept from the jury. This sentiment is taken directly from the case of Kufrin v. State, 378 So.2d 1341 (Fla. 3rd DCA 1980). Similarly Blair v. State, 371 So.2d 224 (Fla. 2d DCA 1979) indicates that a defendant should be afforded a wide latitude to demonstrate bias or a possible motive of a witness, further, than when defendant seeks to cross-examine a State witness regarding pending charges or matters arising out of the same incident for which the defendant is on trial, the

principal is especially true.

By the trial court limiting and restricting the cross-examination of key prosecution witnesses, the Petitioner has been denied fundamental Constitutional rights that are found in the Sixth and Fourteenth Amendments to the Constitution of the United States, and further by Article I, Sections 9 and 16 (which specifically states that the Petitioner has a right to confront at trial adverse witnesses) of the Constitution of Florida. Accordingly, the Court should grant certiorari to settle the conflict bewteen the Florida Supreme Court and the applicable decisions of this Court in its interpretations of the Sixth and Fourteenth Amendments.

VI.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER FAILURE TO GRANT PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL WHEN NO PRIMA FACIE CASE WAS ESTABLISHED AS TO THE ISSUE OF PREMEDITATION VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS.

The trial court denied Petitioner's Motion for Judgment of Acquittal at the close of the State's case (R 1039,1056), and again at the close of all of the evidence (R 1200).

When considering the testimony in evidence as a whole, when viewing the case in its totality, the burden of proof required to substantiate a case of premeditated murder was not met by the State. If the State had substantiated the necessary proof for any lawful homicide, it would be for the crime of murder in the second degree.

When viewing the facts of the entire case, the conclusion most reasonable men would derive would be that this was a crime of passion, a tregedy committed in the course of a blind and jealous rage, without thinking, without time to truly reflect on what was transpiring.

The only real substantial difference between murder in the first degree and murder in the second degree, is that murder in the first degree must be done with a premeditated design to effect death, and this premeditated design must be proven beyond a reasonable doubt. Boyett v. State, 68 So.2d 931 (Fla. 1950). Weaver v. State, 220 So.2d 53 (Fla. 2d DCA 1969) stated that:

> Although specific intent to kill may be inferred from the circumstantial evidence, point of time at which specific intent is inferentially formed cannot be left to guess work or speculation.

In the Weaver case, (supra), the facts, not merely circumstantial evidence, shows that the victim had exclaimed, "No! No!"

prior to the gunshots being heard. As witnesses approached, they saw the defendant pointing the weapon and saw the flash of the last shot being fired. The witnesses then heard the gun click several times after that last shot. The weapon had been fired six times with there being three wounds in the victim's body, two of which were in the back. In that case the Court found, in spite of these facts, that the evidence was insufficient, as a matter of law for a finding of premeditation.

It should be noted this Court reversed the decision and remanded with directions to enter a judgment against the Appellant of guilt of murder in the second degree and impose the appropriate sentence.

The Primary fact in the case at issue here, is whether or not there was any proof beyond and to the exclusion of every reasonable doubt that the Petitioner acted with a premeditated design. The facts in this case when viewed in an objective manner, lends credence to the theory that the Petitioner acted in the heat of passion as a result of what we basically characterize as a "lover's quarrel."

Testimony revealed that the victim had some amount of alcohol in her system (R 381,403) and that death happened quite immediately after the shooting (R 404,411). Further it appears that the area of the actual crime was not spread out, but was rather isolated to one relatively small area of the apartment since there were no indications of blood drippings anywhere else in the house other than at the site of the bed (R 404,405). There was no indication that the victim was being held against her will, indeed the testimony of Mr. Boatwright indicated that she was apparently afraid or was nervous and apprehensive about the possibility of someone other than the Petitioner waiting for her outside the apartment (R 275,280). There is additional evidence that there may have been an argument between the Petitioner and the victim, and that the victim may have been in possession of a knife (R 2323) at the time this argument was taking place (R This issue is covered in Point of Error III, concerning Petitioner's statements, and State's Exhibit "6", "47" and "48"). Indications

are that the Petitioner showed great remorse when meeting with police officers and that when the subject of the victim's death arose, the Petitioner showed great compassion (R this issue also covered in Point of Error III) and that Petitioner evidenced no sincere attempt to effectively escape following his actions. The fact of the packed suitcase and the purse located between the victim's legs, could give rise to argument that the victim was anticipating leaving the Petitioner's apartment, causing emotional distress to the Petitioner. It should be noted that the Petitioner had allegedly beaten the victim on a prior occasion, and yet the victim continued to maintain the relationship with Petitioner; arguably, this would give rise to the theory that the altercation in which the victim was killed occurred spontaneously and without any pre-planned actions on the part of the Petitioner. Not all shots were fired from the revolver (R 1015), there being two live loads in position for the next firing of the revolver. As to the State's theory that the Petitioner struck the victim with a piece of pipe, went to the closet and retrieved the revolver, returned and shot the victim, there is no evidence anywhere in the record to suggest that this was the case; in fact, it could be equally argued that the Petitioner had both weapons in his possession at the time of the incident of committing the act, the shots were fired in rapid succession, and that there was no prolonged thought process or reflection by the Petitioner in committing the act.

In Wright v. State, 348 So.2d 26 (Fla. 1st DCA 1977), the Court made the statement:

> ....in an unbroken line of cases, the Courts of this State have held that, under such conditions, the evidence must be not only consistent with guilt but inconsistent with innocence, or any reasonable hypothesis thereof....If the facts and proof are equally consistent with some other rational conclusion then that of guilt....if the evidence leaves it indifferent, which of several hypothesis' is true, or merely establish some finite probability in favor of one hypothesis rather than the other, such evidence cannot amount to proof, however great the probability may be.

In that the Florida Supreme Court failed to grant the Petitioner's Motions for Judgment of Acquittal based on their being no prima facie case as to the issue of premeditation, which was based solely on circumstantial evidence, the Petitioner was denied due process and equal protection under the law and was denied the right to a fair trial under the Sixth and Fourteenth Amend-

ments to the Constitution of the United States.

VII.

THE COURT SHOULD GRANT CERTIORARI BECAUSE FLORIDA'S DEATH PENALTY AS CONTAINED IN FLORIDA STATUTE 921.141 HAS BEEN APPLIED IN AN ARBITRARY AND INCONSISTENT MANNER THUS RENDERING IT UNCONSTITUTIONAL AS IT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT IN ITS INTERPRETATIONS OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Florida's death penalty as contained in Florida Statute 921.141 is unconstitutional on its face, in that it violates due process and equal protection clauses under the Fourteenth Amendment of the Constitution of the United States. The State of Florida is unable to justify the death penalty as the least restricted means available to further it compelling goals, as is required under Roe v. Wade, 410 U.S. 113,115 (1973), where a fundamental right, such as life is involved. Studies indicate that the death penalty is not an effective deterent to murder in that there are other less offensive methods of punishment available which serve the same "compelling" goals of the State. The imposition of the death penalty on the Petitioner would be patently violative of the Constitution of the United States and of the State of Florida and should be vacated.

Florida's death penalty statute, Section 921.141 is unconstitutional as it has been applied, in that it violates the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States. Although the Supreme Court of Florida and the Supreme Court of the United States have upheld the facial constitutionality of Florida's death penalty against attacks under the Cruel and Unusual Punishment Clause, the death penalty has in fact been administered and applied in a manner which is inconsistent with the applicable decisions of this court. It is clear that the Equal Protection Clause requires that harsh punishment be fairly and even-handedly imposed. See, Skinner v. Oklahoma, ex rel Williamson, 316 U.S. 535 (1942). The "sentencing decisions patterns of juries (and judges under the 1972 Florida Statute) have in fact exhibited a pattern of arbitrary and completious sentencing like that found unconstitutional in Furman v. Georgia, 408 U.S. 238 (1972). "Gregg v. Georgia, 428 U.S. 153 (1976). Death sentences in Florida are imposed irregularly, unpredictably, and whimsically in cases which are not more deserving of capital punishment, under any rational

standard that considers the character of the offender and the offense, than many other cases in which sentences of imprisonment are imposed. Inconsistent and arbitrary jury attitudes and sentencing verdicts, uneven and inconsistent proxitorial practices in seeking or not seeking the death penalty, divergent sentencing policies of trial judges and erratic appellant review by the Supreme Court of Florida often contribute to produce irregular and freakish pattern of life-or-death sentencing results. The facts and circumstances surrounding the alleged murder in this cause demonstrate that the application of the death penalty in this cause, could be based only upon arbitrary and capricious desire to fulfill a revengeful motive.

This Court ruled in Coker v. Georgia, 433 U.S. 584, 53 L.Ed 2d 982, 989 (1977), that "a punishment is excessive and unconstitutional if it....is grossly out of proportion to the severity of the crime." If the penalty of death is not ordinarily imposed in cases with a similar or even more aggravated factual basis and the death penalty is not ordinarily imposed for the type of homicide the Petitioner is alleged to have committed, then the imposition of the death penalty in this case is unconstitutional.

The Florida Supreme Court has stated that it would reduce death sentences if it sees "nothing more shocking in the actual killing than in a majority of cases reviewed by this Court" under the 1972 Legislation, Halliwell v. State, 323 So.2d 557 (Fla. 1975). Specifically, the Court has held that a killing is not "especially heinous, atrocious, or cruel simply because it is unnecessary", Cooper v. State, 336 So.2d 1133 (Fla. 1976); that the "standard" of (this)....aggravating circumstances is whether the horror of the murder is "accompanied by such additional acts as to set the crime apart from the norm, "(supra) at 1141; and that such a standard is not met in a "crime in which the victim is shot twice and dies instantaneously and painlessly."

The Florida Supreme Court has reduced a number of death sentences in cases considerable more aggravating than the Appellant's. See e.g., Swann v. State, 322 So.2d 485 (Fla. 1975), wherein the Appellant gave the victim, who was bound and gagged a "severe beating", and the victim could not survive the torture administered; Halliwell v. State, (supra), wherein the Appellant beat the victim with an iron bar and mutilated the body; Tedder v. State, 322 So.2d 908 (Fla. 1975) wherein the Appellant shot the victim, and refused to allow anyone to

aid she as she lingeringly died; Jones v. State, 322 So.2d 615 (Fla. 1976), wherein the Apellant had been heavily drinking, raped the victim and then stabbed her thirty eight times; Thompson v. State, 328 So.2d 1 (Fla. 1976), wherein the Appellant committed armed robbery and stabbed the victim three times while fleeing.

The execution of the Petitioner would violate the Sixth and Eighth Amendments, and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The imposition of the death penalty in this case violates the history of the Florida Supreme Court decisions which are shown in the cases mentioned before. Accordingly, this Court should grant certiorari to render Florida's Death Penalty as contained in Florida Statute 921.141 unconstitutional and ensure that the death penalty is not applied contrary to the applicable decisions of this Court.

VIII.

THE COURT SHOULD GRANT CERTIORARI BECAUSE FLORIDA'S POLICY OF ACCORDING SOME DEFENDANTS IN CAPITAL CASES THE BENEFIT OF A PRE-SENTENCING INVESTIGATION AND DEPRIVING OTHERS OF THIS BENEFIT IS CONSTITUTIONALLY INTOLERABLE AND DENIES PETITIONER HIS RIGHTS AS GUARANTEED UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS AS DETERMINED BY THIS COURT IN APPLICABLE DECISIONS.

The Supreme Court of Florida, while not specifically requiring pre-sentence investigation reports in death cases, has approved sentences based upon such investigations. See, e.g., Tedder v. State, (supra); Songer v. State, 322 So.2d 481 (Fla. 1975). Since the death penalty statute can only withstand scrutiny under the Eighth and Fourteenth Amendments of the United States Constitution when death sentences are imposed in a non-arbitrary manner and subject to proportionality review, it is constitutionally intolerable to accord some defendants the benefit of pre-sentence investigation and deprive others of this benefit. Denial of a pre-sentence investigation would deprive the Petitioner, an indigent, of his right to due process of law, equal protection of the law, effective assistance of counsel, and his right to be free from cruel and unusual punishment. Proffitt v. Florida, 428 U.S. 424 S.Ct. 2965, 2968 (1976).

Pre-sentence investigations conducted by the Florida Probation and Parole Commission provide detailed background information regarding the Appellant investigated, and, as such, are a source of

information critically relevant to non-statutory mitigating circumstances. Gibson v. State, Case No. 48, 698 (Fla. 1977), opinion filed July 28, 1977 and Florida Statute Section 921.231 (1975). The mitigating circumstances which the jury must consider in determining the appropriate sentence for a defendant found guilty of a capital offense are specifically not limited to those designated in Section 921.141(6), Florida Statutes (1976 Supp.). Proffitt v. Florida,(supra); Elledge v. State, 346 So.2d 998, 1002 (1977).

Since it is correct for a trial judge to consider a presentence investigation in sentencing a defendant convicted of a Capital Offense, the defense must also be accorded the opportunity of presenting relevant information which an investigation might disclose to the jury panel at an advisory sentence proceeding; evidence relevant to a trial judge's sentence in a capital case is necessarily relevant to the jury sentence recommendation and should be presented to the jury at the advisory sentencing hearing. Messer v. State, 337 So.2d 137 (Fla. 1976). Defense counsel must therefore be accorded a reasonable opportunity to examine the presentence investigation prior to the advisory sentencing hearing. Garner v. Florida, 97 S.Ct. 1197 (1977).

In that the trial court denied Petitioner's Motion to have a pre-sentence investigation report compiled and since one was never, in fact, compiled, the Petitioner was denied Constitutionally protected rights under the Eighth and Fourteenth Amendments to the United States Constitution.

IX.

THE COURT SHOULD GRANT CERTIORARI BECAUSE THE IMPOSITION OF THE DEATH PENALTY ON PETITIONER IS UNCONSTITUTIONAL AS THE AGGRAVATING CIRCUMSTANCES IN THE CAPITAL SENTENCING WERE NOT WEIGHED IN AN EVEN HAND AS REQUIRED BY APPLICABLE DECISIONS OF THIS COURT REGARDING THE EIGHTH AND FOURTH AMENDMENTS.

The trial court made findings of three aggravating circumstances and no mitigating circumstances (R 2629, 2630) under F.S. 921.141(3):

overwhelming evidence indicated that the Petitioner was under such influence (R. 102-110, and argument noted in Point of Error I). The evidence also indicates this to be a crime of passion between individuals engaged in an ongoing relationship. Kampff v. State, (supra), Halliwell v. State, (supra).

In Huckaby v. State, 343 So.2d 29 (Fla. 1977) and Miller v. State, 373 So.2d 882 (Fla. 1979), the Court held that mitigating factors, such as the fact that the Petitioner was under the influence of extreme mental or emotional disturbance, can be causely related to aggravating circumstances and thus negate them. This mitigating circumstance should have been found by the trial judge, and even further, that it acts to negate the cold, calculated or premeditated manner of the hom cide.

"In determining the appropriate sentence, there should be no mere accounting process of totalling the aggravating circumstances and the mitigating circumstances, but rather there should be an exercise of reasonable judgment as to what the factual situations require the imposition of death and which situations can be satisfied by life imprisonment in view of the totality of the circumstances," State v. Dickson, 283 So.2d 1, 10 (Fla. 1973). The importance of this principal is that the Florida Statute involves a "weighing" process and thus regardless of the aggravating factors they still must be weighed and a life sentence could be appropriate, even in the absence of mitigating evidence. Elledge v. State, (supra).

"The law does not require that death be imposed in every situation in which a particular set of facts occur. Certain factual situations may warrant the death penalty under the law, but this does not present a sentence of life imprisonment." Alfred v. State, 322 So.2d 533, 540 (Fla. 1975).

"The State must administer its capital sentencing with an even hand." Garner v. Florida, 97 S.Ct. 1197 (1977). "Central to the Eighth Amendment is a determination of contemporary standards regarding infliction of punishment.....the death penalty must be applied consistently with the Eighth and Fourteenth Amendments requirement that the State's power to punish be exercised within limits of civilized standards." Woodson v. North Carolina, 96 S.Ct. 2978 (1976).

1. The Petitioner had been previously convicted of a violent felony (by striking his common law wife in the head three times with an ax).

2. The capital felony involved herein was especially heinous, atrocious, or cruel (by striking the victim with a steel bar, not rendering her uncon-cious, the Petitioner then going into another room to secure a gun, returning and shooting the victim twice.

3. The capital felony was committed in a cold, calculated and premeditated manner without pretext to legal or moral justification (by the above-stated reasons and there being no evidence that the victim was threatening the Petitioner).

The trial court relied on testimony from the sentencing hearing as to the nature of the prior violent felony. The State went into detail beyond the necessary showing (that the Petitioner did, in fact, have a prior violent felony conviction) of prior violent felony, to-wit:

> "...axed her or struck her in the head three times with an ax causing her death." (R. 1539)
>
> "Defendant had committed a prior homocide, not just criminal violence, but homicide in a very deadly manner, using an ax three times." (R. 1546)

The reiteration of a prior allegedly gruesome ax murder cannot have had but an extremely prejudicial effect on the judge and the jury.

The State went even so far as to announce in closing argument during the sentencing hearing:

> "...the homicide in a very deadly manner, using an ax three times. And, the fact that the defendant had performed acts of violence prior to even this murder on Peggy Burnside."
>
> "Three weeks prior had beaten her up in his apartment, knocked her unconscious, held her against her will, struck her twice with a pipe and shot her in the head." (R. 1546)

Here again, the State attempted to, and apparently succeeded in, inflaming the passions of the jury. The reference to prior acts of violence is in error. Petitioner was never charged, much less convicted in the incident in early August of 1979; to use this would be to unduly prejudice the jury and would be error. Provence v. State, 337 So.2d 783 (Fla. 1976), Elledge v. State, (supra) and argument presented in Point of Error V, as to the Williams Rule violation.

The trial court erred in finding that the Petitioner's acts were especially heinous, atrocious, or cruel. There is no substantial evidence that the victim was not unconscious when the fatal shots were fired, or that this was anything more than a series of incidents all committed in the heat of passion. To make such finding, there theoretically should be the showing of a killing beyond the norm, torture, enjoyment of suffering, etc. Instantaneous death from a gunshot would does not qualify. Cooper v. State, 335 So.2d 1133, 1141 (Fla. 1976), Kampff v. State, 371 So.2d 1007 (Fla. 1979), Antone v. State, 382 So.2d 1205 (Fla. 1979, Maggard v. State, (Fla 1981), Case No. 51,614, opinion filed May 7, 1981, Williams v. State, 386 So.2d 538, 534 (Fla. 1980).

The trial judge erred in finding both an especially heinous, atrocious, or cruel aggravating circumstances in addition to finding a killing by a cold, calculated and premeditated design. In Magilla v.State, 382 So.2d 901 (Fla. 1980), the Court rules that "a cold, calculated design to kill constitutes an especially heinous atrocious or cruel murder." When this is taken into account, along with the fact that the indictment and verdict in this case at hand already renders the first degree murder premeditated, there is a doubling of aggravating circumstances. Provence v. State, (supra). In addition, the facts do not justify a finding of an especially heinous, atrocious or cruel circumstances in that this homicide constituted "nothing more shocking in the actually killing than in a majority of murder cases." Halliwell v. State, (supra).

The trial court erred in finding that the homicide was committed in a cold, calculated and premeditated manner due to the above-noted reasons and those raised in Point of Error VII concerning the lack of proof or premeditation beyond a reasonable doubt. In addition, this newest of aggravating circumstances is impermissably vague and overbroad under the United States Constitution.

Finally, the trial court erred in failing to find in mitigation that the Petitioner was, at the time the homicide occurred, under the influence of extreme mental or emotional disturbance. The overwhelming evidence indicated that the Petitioner was under such influence of extreme mental or emotional disturbance. The

In that the trial court findings as to aggravating and mitigating circumstances are in error, the requirements of due process and equal protection under the Fourteenth Amendment to the Constitution of the United States, dictate that the death sentence imposed upon the Petitioner be vacated.

Considering the vast number of cases with similar or more aggravated fact situations in which the defendant has been spared execution, this Court should vacate the death sentence imposed on the Petitioner.

In view of the principal of equal protection under the law, indeed, equal application of the law, the penalty of death is not an appropriate remedy in the Petitioner's case.

CONCLUSION

The judgment entered against RICHARD KING must be reversed and remanded for new trial; in the alternative, the sentence of death imposed upon RICHARD KING must be vacated.

Respectfully submitted,

WARREN H. EDWARDS, ESQUIRE
Suite 101, Bradshaw Building
65 North Orange Avenue
Orlando, Florida 32801
(305) 425-7676
Attorney for Petitioner

out his practice and take the necessary steps to protect his clients.

The respondent shall pay the cost of these proceedings in the amount of $975.95.

It is so ordered.

ALDERMAN, C.J., and OVERTON, McDONALD, EHRLICH and SHAW, JJ., concur.

Richard KING, Appellant,

v.

STATE of Florida, Appellee.

No. 59464.

Supreme Court of Florida.

July 21, 1983.

Rehearing Denied Sept. 16, 1983.

Defendant was convicted in the Circuit Court, Orange Court, Richard B. Keating, J., of murder, and he appealed. The Supreme Court held that: (1) defendant's incriminating statements were properly admitted; (2) trial court properly allowed testimony that defendant had severely beaten victim 23 days prior to the killing; and (3) trial court properly imposed death penalty upon defendant.

Affirmed.

Adkins, J., concurred in conviction, but concurred in result only in sentence.

1. Mental Health ⇐432

Trial court properly found defendant competent to stand trial.

2. Jury ⇐108

Trial court properly excused for cause certain jurors who stated that they were opposed to death penalty but who could sit impartially on issue of guilt or innocence.

3. Criminal Law ⇐438(5)

Trial court in murder prosecution did not err in admitting photographs of victims.

4. Witnesses ⇐268(1)

Trial court in murder prosecution did not improperly restrict defendant's cross-examination of the victim's husband.

5. Homicide ⇐232

Evidence in murder prosecution was sufficient to establish premeditation.

6. Homicide ⇐351

Death penalty statute is both facially constitutional and was constitutionally applied to defendant in murder prosecution. West's F.S.A. § 921.141.

7. Criminal Law ⇐517.2(3)

Confession made by defendant to Daytona Beach police was admissible in murder prosecution, in that he was given his *Miranda* rights and he waived them.

8. Criminal Law ⇐412.1(4)

Response by police officer to defendant's request for an attorney, that he and his fellow officer were there to ask him to repeat what he had already told Daytona Beach police officer, was a totally reasonable response under the circumstances and was not intended to induce defendant to further incriminate himself.

9. Criminal Law ⇐412.2(5)

Defendant gave incriminating statement to Orlando police officers voluntarily, with full knowledge of his right to counsel, and with knowledge that, by giving statement under the circumstances, he was waiving his right to counsel, and thus statement was admissible in murder prosecution.

10. Criminal Law ⇐384
Homicide ⇐159, 162

Trial court in murder prosecution properly allowed testimony that defendant had severely beaten the victim 23 days prior to the killing, despite contention that circumstances of beating were not similar to those of the killing and that beating was too

remote in time to be relevant to case, in that testimony was not remote in time, was proper evidence of premeditation, and was proper for identification since one of the theories of defense was to imply that the victim's present husband could have been the killer.

11. Criminal Law ⇐369.2(4)

Testimony concerning the issue of violent felony of which defendant was previously convicted, the axe slaying of his common-law wife, was properly admitted into evidence and properly relied on by both jury and trial judge in convicting defendant of murder and sentencing him to death.

12. Homicide ⇐354

In sentencing defendant convicted of murder to death, trial court properly relied on aggravating circumstance that killing was heinous, atrocious, and cruel.

13. Homicide ⇐354

Although premeditation was proven, evidence was not sufficient to establish that homicide was committed in a cold and calculated manner, and thus this was not a proper aggravating circumstance to rely upon in sentencing defendant convicted of murder to death.

14. Homicide ⇐354

Total record in case, including psychiatric reports, justified finding of trial court that mitigating circumstance of extreme mental or emotional disturbance did not have to be considered as a factor in imposing sentence in murder prosecution.

15. Homicide ⇐354

Finding that one aggravating circumstance was improper in imposing death sentence upon defendant convicted of murder did not require a resentencing where there remained two aggravating and no mitigating circumstances.

Warren H. Edwards, Orlando, for appellant.

Jim Smith, Atty. Gen., and Mark C. Menser, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

This is an appeal by the appellant, Richard King, from his conviction of first-degree murder and the sentence of death imposed on him by the trial judge in accordance with the jury's recommendation. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and affirm.

The record reflects the following facts. On the morning of August 27, 1979, the victim, Peggy Burnside, was murdered in the Orlando, Florida, apartment she shared with appellant. She had been struck on the forehead with a blunt instrument and then shot in the head. She died as a result of the gunshot wounds. The appellant, while in Daytona Beach, Florida, on the evening of the crime, called the Daytona Beach police and turned himself in, stating that he had seen news reports of the Burnside homicide on television and believed the police were looking for him. A patrolman was dispatched to meet him.

Appellant, after receiving the appropriate *Miranda* warnings, was interviewed by Daytona Beach police officers, to whom he gave a statement. In that statement, appellant indicated that he had argued with the victim that morning and had struck her in the head with a blunt object. The Daytona Beach police contacted the Orlando police department and were advised that the victim had not only been hit with a blunt object but had also been shot in the head. Upon learning that the victim had been shot, the Daytona Beach police officers questioned appellant again. He was advised that the victim had been shot and was asked if he had shot her. Appellant exclaimed, "How would you feel if you just killed someone?" and began crying. He then asked that the interview cease, and his request was honored.

The Orlando police officers thereafter arrived in Daytona Beach. They gave appellant the appropriate *Miranda* warnings; he told them he wanted a lawyer. One of the Orlando police officers told him that they only wanted to talk about what he had

already told the Daytona Beach police detective. Appellant responded with incriminating statements confirming what he had told the Daytona Beach police. He admitted that he had shot the victim twice. Subsequently, the officers attempted to record the conversation, and appellant again requested an attorney. When told that the taping was to be used only as a permanent record of the conversation, appellant continued speaking and made additional incriminating statements.

The evidence at trial established that the victim and the appellant shared a communal living arrangement and that the victim was seeking a divorce from her husband. A .38 caliber revolver and a piece of pipe were found in appellant's apartment, introduced into evidence, and properly identified as the weapons used in this murder. Evidence was also admitted to show that twenty-three days before this incident, appellant had beaten the victim to the point that she became unconscious. Appellant testified in his own behalf and denied that he had shot the victim. Appellant, prior to trial, was examined by three psychiatrists, each of whom found him to be competent at the time of the offense and competent to stand trial.

After the jury returned a verdict of guilty, the state, in the sentencing hearing, introduced evidence that appellant had been convicted of a prior violent felony, specifically, manslaughter, for killing his common-law wife by striking her three times in the head with an axe. Although appellant took the stand in the sentencing hearing, he asserted a fifth amendment privilege and refused to testify. The jury returned a verdict recommending the imposition of the death penalty. The trial judge refused a request for a pre-sentence investigation report and determined that the death penalty was appropriate, finding the following three aggravating circumstances:

A. That the Defendant was previously convicted of a felony involving the use of violence to the person in that in 1969 in South Carolina he killed a woman by striking her in the head three times with an axe and was convicted of manslaughter for that killing;

B. That the capital felony involved herein was especially heinous, atrocious, or cruel in that the victim was struck forcefully in the face by the Defendant with a heavy steel bar, not rendering the victim unconscious, after which the Defendant went to another room of the house involved and secured a pistol and returned to the victim and shot her in the face and in the back of the head with the pistol, causing her death;

C. That the capital felony involved herein was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification in that after having struck the victim a grevious [sic] blow in the face with a heavy steel bar, which did not render the victim unconscious, the Defendant went to another room of the house involved, secured a pistol from its place of concealment, returned to the victim and shot her with the pistol, once in the face and once in the back of the head; that the said acts of the Defendant were precipitated by an argument with the victim; that there is no evidence that the victim, who was female and physically smaller than the Defendant, was threatening the Defendant in any way at the time of his said acts.

The trial judge found no mitigating circumstances.

Trial Phase

Appellant asserts that his conviction should be vacated upon eight grounds: (1) the trial court erred in finding appellant competent to stand trial; (2) the trial court improperly excused for cause certain jurors who stated that they were opposed to the death penalty but who could sit impartially on the issue of guilt or innocence; (3) the trial court improperly admitted appellant's oral and written statements because they

were given after he had exercised his right to counsel; (4) the trial court improperly admitted a photograph of the victim; (5) the trial court erred in allowing the admission of testimony that the victim had been beaten by appellant twenty-three days prior to the killing; (6) the trial court improperly restricted the appellant's cross-examination of the husband of the victim; (7) the evidence was insufficient to establish premeditation; and (8) section 921.141, Florida Statutes (1979), is facially unconstitutional or, if constitutional, was unconstitutionally applied to the facts of this case.

[1-6] We find that none of these issues has any merit and that six may be disposed of summarily. With regard to the first issue, the competency of the defendant, appellant in effect disagrees with the expert testimony presented to the trial judge. Three psychiatrists examined the appellant and found him sane and competent to communicate, advise, and assist counsel. *See Lane v. State*, 388 So.2d 1022, 1025 (Fla. 1980). The second issue, the propriety of excusing jurors who stated that they were opposed to the death penalty but that they could sit impartially on the issue of guilt or innocence, has been previously resolved by this Court in *King v. State*, 390 So.2d 315 (Fla.1980), *cert. denied*, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981), and in *Witt v. State*, 342 So.2d 497 (Fla.), *cert. denied*, 434 U.S. 935, 98 S.Ct. 422, 54 L.Ed.2d 294 (1977). We find no impropriety in the trial judge's excusing the jurors in this case. We also note that no objection was raised by appellant at the time the jurors were excused. We next find that neither the admission of the photograph of the victim nor the asserted restriction on the cross-examination of the victim's husband was reversible error. Further, the evidence was clearly sufficient to establish premeditation, and section 921.141 is both facially constitutional, as we have previously held, and has been constitutionally applied to the appellant in this case.

The issues pertaining to the confessions of the appellant and to the prior violent episode between appellant and the victim require a more extensive discussion.

Confessions

[7] Appellant asserts that his confessions should be suppressed on the grounds that they were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). It is important to recognize that appellant made two separate confessions. The first was made to the Daytona Beach police, to whom he turned himself in and who knew nothing of the incident at the time he was taken into custody. In this first interview, appellant admitted hitting the victim in the head with a blunt instrument, and, when asked by the Daytona Beach police officers whether he shot the victim, he broke down and cried, saying, "How would you feel if you had just killed someone?" This confession was clearly admissible since appellant was given his *Miranda* rights and waived them. There is no real assertion by appellant that this statement should have been suppressed.

The admissions and statements which bring into issue the principles set forth in *Edwards v. Arizona* are those appellant gave to the Orlando police officers when they came to Daytona Beach to talk to him about this incident. Appellant contends that these statements were erroneously admitted into evidence because appellant made them after asking for counsel. The record is clear that the Orlando officers properly gave appellant his *Miranda* warnings. One officer testified that, after he gave appellant his constitutional rights, the following exchange occurred:

> As I was starting the interview, he said to me, he, "I think I need an attorney." And at which time I responded, "We're only here to talk to you about what the detective from Daytona Beach talked to you about."

Appellant responded by giving a detailed statement of what occurred between him and the victim. The statement was subsequently taped, reduced to writing, and signed by appellant.

We must look at all the circumstances surrounding this second statement to determine its admissibility. The rule, as expressed by Justice White in *Edwards*, states:

> It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which *depends in each case "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."* *Johnson v. Zerbst*, 304 U.S. 458, 464 [58 S.Ct. 1019, 1023, 82 L.Ed. 1461] (1938). See *Faretta v. California*, 422 U.S. 806, 835 [95 S.Ct. 2525, 2541, 45 L.Ed.2d 562] (1975); *North Carolina v. Butler*, 441 U.S. 369, 374–375 [99 S.Ct. 1755, 1757–1758, 60 L.Ed.2d 286] (1979); *Brewer v. Williams*, 430 U.S. 387, 404 [97 S.Ct. 1232, 1242, 51 L.Ed.2d 424] (1977); *Fare v. Michael C.*, 442 U.S. 707, 724–725 [99 S.Ct. 2560, 2571, 61 L.Ed.2d 197] (1979).

451 U.S. at 482, 101 S.Ct. at 1883. (Emphasis added.) There is no "paternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case." *Michigan v. Mosely*, 423 U.S. 96, 109, 96 S.Ct. 321, 329, 46 L.Ed.2d 313 (White, J., concurring in result). Whether the appellant in this instance chose to continue to talk to police without counsel, knew his rights, and knew that in giving a statement he was waiving the right to counsel, are questions of fact to be determined in light of all the circumstances.

[8] The evidence in this case reflects that appellant had been fully advised of his rights on numerous occasions and had signed three waiver forms, one for the Daytona Beach police and two for the Orlando police; that he was familiar with the criminal process because he had previously been charged, tried, and convicted for a serious felony; that he had turned himself in and had just previously admitted that he had struck the victim in the head with a blunt object and implied that he had killed the victim. We believe that the response by the officer to appellant's request for an attorney, that he and his fellow officer were there to ask him to repeat what he had already told the Daytona Beach police officer, was a totally reasonable response under the circumstances and was not intended to induce appellant to further incriminate himself. *See Edwards*, 451 U.S. 477, 490, 101 S.Ct. 1880, 1887, 68 L.Ed.2d 378 (Powell, J., concurring in result) (police may legitimately inquire whether a suspect has changed his mind about speaking to them).

[9] We conclude that appellant gave the statement to the Orlando police officers voluntarily, with full knowledge of his rights to counsel, and with knowledge that, by giving the statement under the circumstances, he was waiving his right to counsel. This was clearly not a situation such as that in *Edwards*, where the defendant stated, "I want an attorney before making a deal," and was subsequently advised that he had to talk to the detectives.

We recognize that, given the various interpretations of *Edwards*, the admissibility of the statements appellant made to the Orlando police officers presents a close question. On the present record, however, we find that even had the trial court excluded these statements, the admissions appellant had made to the Daytona Beach police, combined with the other evidence in the case, clearly established appellant's guilt. The trial court's error, if any, was harmless under the principles set forth in *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969).

Evidence that Appellant Had Previously Assaulted the Victim

[10] Appellant contends the trial court improperly allowed testimony that he had severely beaten the victim twenty-three days prior to the killing. Appellant asserts that the circumstances of this beating were not similar to those of the killing and that the beating was too remote in time to be relevant to the case. Consequently, he argues, this evidence was admitted in violation of *Williams v. State*, 110 So.2d 654 (Fla.), *cert. denied*, 361 U.S. 847, 80 S.Ct.

102, 4 L.Ed.2d 86 (1959), because it was utilized only to show propensity and not to prove an element essential to this offense. We disagree. We believe that the testimony was not remote in time, was proper as evidence of premeditation, and was proper for identification since one of the theories of appellant's defense was to imply that the victim's present husband could have been the killer. Under these circumstances, we find the testimony admissible.

Sentencing Phase

[11, 12] Appellant contends that the trial court erred in finding three aggravating circumstances and no mitigating circumstances. First, appellant contends that the testimony concerning the nature of the violent felony of which he was previously convicted, the axe-slaying of his common-law wife, was improperly admitted into evidence and improperly relied on by both the jury and the trial judge. We find this contention incomprehensible. A judge and jury, in imposing sentence, must know the nature of the offense in order to give proper weight to the violent felony conviction. We also disagree with the assertion that the killing in the instant case culminated a series of incidents occurring in the heat of passion, and, that, therefore, this killing was not heinous, atrocious, or cruel.

[13] We do, however, question the finding that this murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification, as we have now defined this aggravating factor. The trial judge in this case did not have the benefit of our recent decisions in *McCray v. State*, 416 So.2d 804 (Fla.1982); *Jent v. State*, 408 So.2d 1024 (Fla.1981), *cert. denied*, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982); and *Combs v. State*, 403 So.2d 418 (Fla.1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982). Although premeditation was proven, we do not think the evidence was sufficient to establish that this homicide was committed in a cold and calculated manner. As we have stated, this "aggravating circumstance ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive." *McCray*, 416 So.2d at 807. We conclude that this was not a proper aggravating circumstance under the facts of this case.

[14] Appellant also argues that the mitigating circumstance of extreme mental or emotional disturbance should have been considered by the trial judge because of appellant's mental condition. He supports this argument by citing his behavior at trial: He refused to wear civilian clothes at the trial, asserted that he was black when in fact he is Caucasian, and insisted on testifying at the sentencing hearing, only to assert a fifth amendment privilege. In addition, appellant contends that this was a crime of passion occurring between two individuals engaged in an on-going relationship. We find that the total record in this case, including the psychiatric reports, justifies the finding of the trial judge that this mitigating circumstance need not be considered as a factor in imposing sentence in this case.

[15] Our finding that one aggravating circumstance was improper does not require a resentencing where there remain two aggravating and no mitigating circumstances. *Enmund v. State*, 399 So.2d 1362 (Fla.1981), *rev'd on other grounds*, — U.S. —, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *Hargrave v. State*, 366 So.2d 1 (Fla.1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979). In affirming the imposition of the death penalty on appellant, we note that the facts in this case are similar to those in *Harvard v. State*, 414 So.2d 1032 (Fla.1982), *cert. denied*, — U.S. —, 103 S.Ct. 764, 74 L.Ed.2d 979 (1983), where we also affirmed the death penalty. Appellants in both cases killed women with whom they had a relationship, and, in both cases, appellants had previously been convicted of similar violent offenses.

For the reasons expressed, we affirm the conviction and sentence of death.

It is so ordered.

ALDERMAN, C.J., and BOYD, OVERTON, McDONALD and EHRLICH, JJ., concur.

ADKINS, J., concurs in the conviction, but concurs in result only in the sentence.

Clyde FOSTER, Appellant,

v.

STATE of Florida, Appellee.

No. 60549.

Supreme Court of Florida.

July 21, 1983.

Rehearing Denied Sept. 16, 1983.

Defendant appealed from a judgment of the Circuit Court, Columbia County, Samuel S. Smith, J., in which a sentence of death was imposed for his conviction for murder. The Supreme Court, 387 So.2d 344, reversed and remanded. On remand, the Circuit Court, Columbia County, Royce Aguer, J., again convicted the defendant and imposed the death sentence. Appeal was taken. The Supreme Court, Alderman, C.J., held that: (1) testimony of a State witness from the first trial could be read to the jury during the second trial, after the death of the witness, where a conflict of interest did not impair or affect the adequacy of the cross-examination of the witness; (2) the defendant failed to preserve for review any claim of error regarding an instruction on second-degree felony-murder; (3) State did not prove beyond a reasonable doubt that the defendant committed the murders to avoid lawful arrest or to hinder law enforcement; and (4) remand was necessary for reconsideration of the remaining aggravating circumstance and mitigating circumstances.

Affirmed in part, vacated in part and remanded for resentencing.

Boyd, J., concurred in part and dissented in part with an opinion.

Adkins, J., concurred in the conviction, but dissented from the sentence.

1. Criminal Law ⇐544

Prior testimony of State witness who died before second trial of defendant could be read to jury during second trial, despite defendant's claim that his attorney did not adequately cross-examine witness because of conflict of interest, where prior conviction was reversed solely because of conflict of interest that was created when trial court appointed same attorney to represent both defendant and his codefendant who subsequently became witness for State, but there was no indication that conflict of interest impaired or affected adequacy of cross-examination. U.S.C.A. Const.Amend. 6.

2. Homicide ⇐325

Where defendant's attorneys did not object to instruction on second-degree felony-murder which was based on definition not in effect at time of murders, defendant failed to preserve claimed error for review. West's F.S.A. RCrP Rule 3.390(d).

3. Homicide ⇐354

Death sentence could not stand where State did not prove beyond reasonable doubt that defendant committed murders to avoid lawful arrest or to hinder law enforcement.

4. Homicide ⇐345

After District Court of Appeal determined that two aggravating factors in support of death penalty were not supported by evidence, remand was necessary for evaluation of relative weight of one remaining aggravating circumstance and two mitigating circumstances in original sentencing order.

APPENDIX B

Supreme Court of Florida

THURSDAY, NOVEMBER 17, 1983

RICHARD KING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 59,464

Upon consideration of the Motion for Stay of Execution filed in the above cause by attorney for appellant,

IT IS ORDERED that said Motion be and the same is hereby denied.

A True COPY

TEST:

Sid J. White
Clerk, Supreme Court

TC
cc: Warren H. Edwards, Esquire
Mark C. Menser, Esquire

RECEIVED

APPENDIX C

Supreme Court of Florida

FRIDAY, SEPTEMBER 16, 1983

RICHARD KING,	*	
Appellant,	*	
v.	*	CASE NO. 59,464
STATE OF FLORIDA,	*	Circuit Court No. CR79-3450 Div. 12 (Orange)
Appellee.	*	

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for appellant, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Sanya Carroll
Deputy Clerk

TC
cc: Hon. W. D. Gorman, Clerk
Hon. Richard B. Keating, Judge

Warren H. Edwards, Esquire
Mark C. Menser, Esquire

RECEIVED 9/19/83

APPENDIX D

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO. CR 79-3450

STATE OF FLORIDA,

Plaintiff,

vs

RICHARD KING,

Defendant.

ORDER

Comes now the Court and makes the following finding of facts:

1. That the Defendant was indicted and tried for, and found guilty of, the crime of murder in the first degree;
2. That the jury recommended to the Court by a vote of nine to three that the Court sentence the Defendant to death;
3. That certain of the aggravating circumstances listed in Florida Statute 921.141(5) exist in this cause, to-wit:

   A. That the Defendant was previously convicted of a felony involving the use of violence to the person in that in 1969 in South Carolina he killed a woman by striking her in the head three times with an axe and was convicted of manslaughter for that killing;

   B. That the capital felony involved herein was especially heinous, atrocious, or cruel in that the victim was struck forcefully in the face by the Defendant with a heavy steel bar, not rendering the victim unconscious, after which the Defendant went to another room of the house involved and secured a pistol and returned to the victim and shot her in the face and in the back of the head with the pistol, causing her death;

C. that the capital felony involved herein was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification in that after having struck the victim a grevious blow in the face with a heavy steel bar, which did not render the victim unconscious, the Defendant went to another room of the house involved, secured a pistol from its place of concealment, returned to the victim and shot her with the pistol, once in the face and once in the back of the head; that the said acts of the Defendant were precipitated by an argument with the victim; that there is no evidence that the victim, who was female and physically smaller than the Defendant, was threatening the Defendant in any way at the time of his said acts:

4. That the aggravating circumstances specified in Florida Statute 921.141(5) and not found in 3., above, to exist in this cause do not exist in this cause;

5. That no mitigating circumstances, either those listed in Florida Statute 921.141(6) or others, exist in this cause;

6. That sufficient aggravating circumstance exist in this cause, not outweighed by sufficient mitigating circumstances, to justify the sentence of death.

DONE and ORDERED at Orlando, Orange County, Florida this 2nd day of July, 1980.

Richard B. Keating
JUDGE

Copies to:

State Attorney, Ninth Judicial Circuit
Public Defender, Ninth Judicial Circuit

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EXHIBIT E

STATE OF FLORIDA,

Plaintiff,

vs.

Richard King

Defendant

IN THE [illegible] COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

CASE NUMBER 80-79-3450

Jul 1 3 23 PM '80

O.R. 3123 PG 1620

FILED IN OPEN COURT
THIS 2 DAY OF July 19 80
R. P. Kirkland, Clerk
By Doreen Leach D.C.

JUDGMENT AND SENTENCE

You, Richard King, being now before the Court, attended by your attorney, Charles Tolbert, and you having (1) been tried and found guilty of (2) ~~pleaded guilty~~ to (3) pleaded ~~nolo contendere~~ to Murder in the First Degree on June 19 1980

the Court Adjudges that you are guilty of said offense, and it is the Sentence of the Law and the Judgment of the Court that you, Richard King ~~(1) DEPARTMENT OF CORRECTIONS TO BE IMPRISONED FOR~~ BE COMMITTED TO THE CUSTODY OF THE ~~(2) Department of Corrections (3) Orange County Jail, to be imprisoned for a term of~~ Life

and you are further Ordered to pay a fine of $ ~~[illegible]~~, $ 10.00 as required by Sec. 960.20 $ ~~[illegible]~~ as 5% surcharge under Sec. 960.25, and Cost in the amount of $ 2.10.

~~and you are further Ordered to pay a fine of $ [illegible] and Cost in the amount of $ [illegible].~~

DONE and ADJUDGED in open Court at Orlando, Orange County, Florida this the 2nd day of July, 19 80, pursuant to Rules 3.670 and 3.700 RCrP.

Richard D. Keating
JUDGE

(Fingerprints, if required by Sec. 921.241 Florida Statutes)

4 FINGERS TAKEN SIMULTANEOUSLY	LEFT THUMB	RIGHT THUMB	4 FINGERS TAKEN SIMULTANEOUSLY
LEFT HAND			RIGHT HAND

I hereby certify that the above and foregoing fingerprints on this judgment are the fingerprints of the defendant, Richard King, and that they were placed thereon by said defendant in my presence, in open Court, this the 2nd day of July, 19 80, pursuant to Sec. 921.241.

RECORDED & RECORD VERIFIED

Doreen Leach

Richard D. Keating
JUDGE

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[illegible] JUDGE E-1

CHAPTER 921

SENTENCE

921.09 Fees of physicians who determine sanity at time of sentence.—The court shall allow reasonable fees to physicians appointed by the court to determine the mental condition of a defendant who has alleged insanity as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 255, ch. 19554, 1939; CGL 1940 Supp. 8663(264); s. 121, ch. 70-339.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 258, ch. 19554, 1939; CGL 1940 Supp. 8663(267); s. 122, ch. 70-339.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon

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the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 2, ch. 74-284; 1979 C.G.L. 1980 Supp. 921.141; s. 1, ch. 79-353; s. 1, ch. 72-724; s. 9, ch. 72-724; s. 1, ch. 74-174; s. 249, ch. 77-104; s. 1, ch. 77-174; s. 1, ch. 79-353.

Note.—Former s. 919.23.

921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.—

(1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has pleaded guilty or nolo contendere to any crime, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced to:

(a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or

(b) Submit a written statement under oath to the office of the state attorney, which shall be filed with the sentencing court.

(2) The state attorney or any assistant state attorney shall advise all victims that statements, whether oral or written, shall relate solely to the facts of the case and the extent of any injuries, financial losses, and loss of earnings directly resulting from the crime for which the defendant is being sentenced.

(3) The court may refuse to accept a negotiated plea and order the defendant to stand trial.

History.—s. 9, ch. 76-274.

921.15 Stay of execution of sentence to fine; bond and proceedings.—

(1) When a defendant is sentenced to pay a fine, he shall have the right to give bail for payment of the fine and the costs of prosecution. The bond shall be executed by the defendant and two sureties approved by the sheriff or the officer charged with execution of the judgment.

(2) The bond shall be made payable in 90 days to the Governor and his successors in office.

(3) If the bond is not paid at the expiration of 90 days, the sheriff or the officer charged with execution of the judgment shall indorse the default on the bond and file it with the clerk of the court in which the judgment was rendered. The clerk shall issue an execution as if there had been a judgment at law on the bond, and the same proceedings shall be followed as in other executions. After default of the bond, the convicted person may be proceeded against as if bond had not been given.

History.—s. 269, ch. 19554, 1939; CGL 8428, 8427; CGL 1940 Supp. 8001(270); s. 123, ch. 70-339.

921.16 When sentences to be concurrent and when consecutive.—

(1) A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall

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CHAPTER 913

TRIAL JURY

913.03 Grounds for challenge to individual jurors for cause.—A challenge for cause to an individual juror may be made only on the following grounds:

(1) The juror does not have the qualifications required by law;

(2) The juror is of unsound mind or has a bodily defect that renders him incapable of performing the duties of a juror;

(3) The juror has conscientious beliefs that would preclude him from finding the defendant guilty;

(4) The juror served on the grand jury that found the indictment or on a coroner's jury that inquired into the death of a person whose death is the subject of the indictment or information;

(5) The juror served on a jury formerly sworn to try the defendant for the same offense;

(6) The juror served on a jury that tried another person for the offense charged in the indictment, information, or affidavit;

(7) The juror served as a juror in a civil action brought against the defendant for the act charged as an offense;

(8) The juror is an adverse party to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution;

(9) The juror is related by blood or marriage within the third degree to the defendant, the attorneys of either party, the person alleged to be injured by the offense charged, or the person on whose complaint the prosecution was instituted;

(10) The juror has a state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will prevent him from acting with impartiality, but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not be a sufficient ground for challenge to a juror if he declares and the court determines that he can render an impartial verdict according to the evidence;

(11) The juror was a witness for the state or the defendant at the preliminary hearing or before the grand jury or is to be a witness for either party at the trial;

(12) The juror is a surety on defendant's bail bond in the case.

History.—s. 84, ch. 19554, 1939; CGL 1940 Supp. 8[illegible]; s. 91, ch. 70-339; cf. s. 8[illegible] Qualifications of jurors.

913.08 Number of peremptory challenges.—

(1) The state and the defendant shall each be allowed the following number of peremptory challenges:

(a) Ten, if the offense charged is punishable by death or imprisonment for life;

(b) Six, if the offense charged is punishable by imprisonment for more than 12 months but is not punishable by death or imprisonment for life;

(c) Three, for all other offenses.

(2) If two or more defendants are tried jointly, each defendant shall be allowed the number of peremptory challenges specified in subsection (1), and the state shall be allowed as many challenges as are allowed to all of the defendants.

History.—s. 190, ch. 19554, 1939; CGL 1940 Supp. 8[illegible]; s. 86, ch. 70-339.

913.10 Number of jurors.—Twelve persons shall constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other criminal cases.

History.—s. 191, ch. 19554, 1939; CGL 1940 Supp. 8[illegible]; s. 87, ch. 70-339.

913.12 Qualifications of jurors.—The qualifications of jurors in criminal cases shall be the same as their qualifications in civil cases.

History.—RS 2949; GS 3850; RGS 9487; CGL 8567; s. 88, ch. 70-339.
Note.—Former s. 932.19.

913.13 Jurors in capital cases.—A person who has beliefs which preclude him from finding a defendant guilty of an offense punishable by death shall not be qualified as a juror in a capital case.

History.—s. 12, ch. 1637, 1869; RS 2950; GS 3851; RGS 9488; CGL 8568; s. 89, ch. 70-339.
Note.—Former s. 932.20.

913.15 Special jurors.—The court may summon jurors in addition to the regular panel.

History.—RS 2953; GS 3854; RGS 9447; CGL 8570; s. 91, ch. 70-339.
Note.—Former s. 932.22.

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Rule 3.110 RULES OF CRIMINAL PROCEDURE

Notes of Decisions

1. In general

In exercise of its power to restrict upon occasion the public character of judicial proceedings or to regulate or place certain limitations on public access to persons in custody insofar as such restraints are necessary to fair trial court could prohibit the photographing of prisoner in jail pending his arraignment on rape charge or on his way to or from the court session or in the courtroom. Brumfield v. State, 1959, 108 So.2d 33.

The intent and spirit of Canon 35 of the Florida code of ethics governing judges superseded by the code of judicial conduct which canon prohibits the taking of photographs in a court room, would not be violated by permitting newsreel and television coverage of a hearing conducted for the purpose of revoking, suspending, etc., the license of a professional bail bondsman or limited surety agent, such hearings being administrative or quasi-judicial, and not strictly judicial in nature. 1958 Op.Atty.Gen. Revised 058-298, Dec. 17, 1958.

Rule 3.111. Providing Counsel to Indigents

(a) When Counsel Provided. A person entitled to appointment of counsel as provided herein shall have counsel appointed when he is formally charged with an offense, or as soon as feasible after custodial restraint or upon his first appearance before a committing magistrate, whichever occurs earliest.

(b) Cases Applicable.

(1) Counsel shall be provided to indigent persons in all prosecutions for offenses punishable by imprisonment (or by incarceration in a juvenile corrections institution) including appeals from the conviction thereof. Counsel does not have to be provided to an indigent person in a prosecution for a misdemeanor or violation of a municipal ordinance if the judge, prior to trial, files in the cause a statement in writing that the defendant will not be imprisoned in the event he is convicted.

(2) Counsel may be provided to indigent persons in all proceedings arising from the initiation of a criminal action against a defendant, including post-conviction proceedings and appeals therefrom, extradition proceedings, mental competency proceedings, and other proceedings which are adversary in nature, regardless of the designation of the court in which they occur or the classification of the proceedings as civil or criminal.

(3) Counsel may be provided to a partially indigent person upon his request provided that person shall defray that portion of the cost of such representation and the reasonable costs of investigation as he is able to without substantial hardship to himself or his family, as directed by the court.

(4) "Indigent" as used herein shall mean a person who is unable to pay for the services of an attorney, including costs of in-

vestigation, without substantial hardship to himself or his family; "partially indigent" as used herein shall mean a person unable to pay more than a portion of the fee charged by an attorney, including costs of investigation, without substantial hardship to himself or his family.

(c) Duty of Booking Officer.

In addition to any other duty, the officer who commits a defendant to custody has the following duties:

(1) He shall immediately advise the defendant:

(i) of his right to counsel;

(ii) that if the defendant is unable to pay a lawyer, one will be provided immediately at no charge.

(2) If the defendant requests counsel or advises the officer he cannot afford counsel, said officer shall immediately and effectively place said defendant in communication with the (office of) Public Defender of the circuit in which the arrest was made.

(3) If the defendant indicates he has an attorney or is able to retain an attorney, the officer shall immediately and effectively place said defendant in communication with his attorney or the Lawyer Referral Service of the local bar association.

(4) The Public Defender of each Judicial Circuit may upon being contacted by, or on behalf of a defendant who is, or represents himself to be indigent as defined by law, forthwith interview said defendant and

(i) If the defendant is in custody and reasonably appears to be indigent, the Public Defender shall tender to him such advice as is indicated by the facts of the case; seek the setting of a reasonable bail and otherwise represent such defendant pending a formal judicial determination of indigency.

(ii) If the defendant is at liberty on bail or otherwise not in custody, the Public Defender shall elicit only such information from the defendant as may be reasonably relevant to the question of indigency and shall immediately seek a formal judicial determination of indigency. If the court finds the defendant indigent, it shall immediately appoint counsel to represent said defendant.

(d) Waiver of Counsel.

(1) The failure of a defendant to request appointment of counsel or his announced intention to plead guilty shall not, in itself, constitute a waiver of counsel at any stage of the proceedings.

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(2) A defendant shall not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry into accused's comprehension of that offer and his capacity to make that choice intelligently and understandingly has been made.

(3) No waiver shall be accepted where it appears that the defendant is unable to make an intelligent and understanding choice because of his mental condition, age, education, experience, the nature or complexity of the case, or other factors.

(4) A waiver of counsel made in court shall be of record; a waiver made out of court shall be in writing with not less than two attesting witnesses. Said witnesses shall attest the voluntary execution thereof.

(5) If a waiver is accepted at any stage of the proceedings, the offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceedings at which the defendant appears without counsel.

Committee Notes

1972 Adoption. Part I of the ABA Standard relating to Providing Defense Services deals with the general philosophy for providing criminal defense services and while the committee felt that the philosophy should apply to the Florida Rules of Procedure, the standards were not in such form to be the subject of that particular rule. Since the standards deal with the national situation, contained in them were alternative methods of providing defense services, i. e., assigned counsel vs. defender system; but, Florida, already having a defender system, need not be concerned with the assigned counsel system.

(a) Taken from the first sentence of ABA Standard 5.1. There was considerable discussion within the committee concerning the time when counsel should be appointed and who should notify defendant's counsel. The commentary in the ABA Standard under 5.1a, b, convinced the committee to the language here contained.

(b) Standard 4.1 provides that counsel should be provided in all criminal cases punishable by loss of liberty, except those types where such punishment is not likely to be imposed. The committee determined that the philosophy of such Standard should be recommended to the Florida Supreme Court. The committee determined that possible deprivation of liberty for any period makes a case serious enough that the accused should have the right to counsel.

(c) Based upon recommendation of ABA Standard 5.1b and the commentary thereunder which provides that implementation of a rule for providing the defendant with counsel should not be limited to providing a means for the accused himself to contact a lawyer.

(d) From Standard 7.2 and the commentaries thereunder.

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as is charged refuses to take any action whatever in the case, either as to bail or trial, on the ground that he is disqualified by reason of interest and affinity to act, and it does not appear to the supreme court on a habeas corpus proceeding that the judge is disqualified, bail conditioned for the party's appearance before the criminal court of record will be allowed. Ex parte Harris, 1890, 26 Fla. 77, 7 So. 1, 6 L.R.A. 714, 23 Am. St.Rep. 548.

A person accused of a capital crime, and held under a mittimus issued by a magistrate to await the action of the grand jury, is entitled upon habeas corpus to introduce evidence and show the real character or circumstances of the alleged offense, and should be admitted to bail unless "the proof is evident, or the presumption great," that he is guilty of a capital offense. This right on habeas corpus is not lost or surrendered by the accused having waived a preliminary examination before the magistrate, and the omission of the magistrate to make the examination on account of such waiver. Benjamin v. State, 1889, 25 Fla. 673, 6 So. 433.

Where no arrest is made for traffic violation, there is no statutory authority for sheriff's department to give alleged traffic violator a notice designated as a summons informing alleged offender to appear before court, and, though he may voluntarily appear and subject himself to jurisdiction, he may not be penalized for failure to do so. 1955 Op.Atty. Gen. 055-90, May 3, 1955.

28. Review

Record failed to establish right to bail. State ex rel. Lopez v. Stack, App.1974, 291 So.2d 207.

Appeal is available for orderly review of denial of bail pending trial. Flicker v. Duff, App.1974, 280 So.2d 129.

The exercise of discretion in admitting accused to bail is not subject to review on certiorari. State v. Frear, 1945, 155 Fla. 479, 20 So.2d 481.

Supreme Court had no jurisdiction to review on appeal, on behalf of state, an order of circuit court releasing accused on bail. Id.

29. Remand

Where trial court did not have before him supreme court views as to factors to be considered by him in exercising his discretion as to whether to release defendant on bail at time he denied defendant's application for bail, supreme court would relinquish jurisdiction of defendant's application temporarily, and remand the matter to trial court with directions to reconsider defendant's application for bail in light of standards set forth by Supreme Court. Younghans v. State, 1956, 90 So.2d 308.

Judgment in habeas corpus proceeding remanding to custody without bail one indicted for first-degree murder was not res judicata precluding admission of accused to bail after a mistrial during which state's attorney sought conviction of murder in second degree only, in circuit court's exercise of discretion. State v. Frear, 1945, 155 Fla. 480, 20 So.2d 481.

Rule 3.131. Pretrial Probable Cause Determinations and Adversary Preliminary Hearings

(a) Nonadversary Probable Cause Determination.

(1) *Defendants in Custody.* In all cases where the defendant is in custody, a nonadversary probable cause determination shall be held before a magistrate within 72 hours from the time of the defendant's arrest; provided, however, that this proceeding shall not be required when a probable cause determination has

been previously made by a magistrate and an arrest warrant issued for the specific offense for which the defendant is charged. The magistrate for good cause may continue the proceeding for not more than 24 hours beyond the above 72-hour period. This determination shall be made if the necessary proof is available at the time of the first appearance as required under Rule 3.130, but the holding of this determination at said time shall not affect the fact that it is a nonadversary proceeding.

(2) *Defendants on Pretrial Release.* A defendant who has been released from custody before a probable cause determination is made and who is able to establish that his pretrial release conditions are a significant restraint on his liberty may file a written motion for a nonadversary probable cause determination setting forth with specificity the items of significant restraint that a finding of no probable cause would eliminate. The motion shall be filed within 21 days from the date of arrest, and notice shall be given to the State. The magistrate shall, if he finds significant restraints on the defendant's liberty, make a probable cause determination within 7 days from the filing of the motion.

(3) *Standard of Proof.* Upon presentation of proof, the magistrate shall determine whether there is probable cause for detaining the arrested person pending further proceedings. The defendant need not be present. In determining probable cause to detain the defendant, the magistrate shall apply the standard for issuance of an arrest warrant, and his finding may be based upon sworn complaint, affidavit, deposition under oath, or, if necessary, upon testimony under oath properly recorded.

(4) *Action on Determination.* If probable cause is found, the defendant shall be held to answer the charges. If probable cause is not found or the specified time periods are not complied with, the defendant shall be released from custody unless an information or indictment has been filed, in which event the defendant shall be released on his or her own recognizance subject to the condition that he or she appear at all court proceedings, or shall be released under a summons to appear before the appropriate court at a time certain. Such release does not, however, void further prosecution by information or indictment but does prohibit any restraint on liberty other than appearing for trial. A finding that probable cause does or does not exist shall be made in writing, signed by the magistrate, and filed, together with the evidence of such probable cause, with the clerk of the court having jurisdiction of the offense for which the defendant is charged.

(b) Adversary Preliminary Hearing.

(1) *When Applicable.* A defendant who is not charged in an information or indictment within 21 days from the date of his arrest or service of the capias upon him shall have a right to an adversary preliminary hearing on any felony charge then pending against him. The subsequent filing of an information or indictment shall not eliminate a defendant's entitlement to this proceeding.

(2) *Process.* The magistrate shall issue such process as may be necessary to secure attendance of witnesses within the state for the state or the defendant.

(3) *Witnesses.* All witnesses shall be examined in the presence of the defendant and may be cross-examined. Either party may request that the witnesses be sequestered. At the conclusion of the testimony for the prosecution, the defendant shall, if he so elects, be sworn and testify in his own behalf, and in such cases he shall be warned in advance of testifying that anything he may say can be used against him at a subsequent trial. He may be cross-examined in the same manner as other witnesses, and any witnesses offered by him shall be sworn and examined.

(4) *Record.* At the request of either party, the entire preliminary hearing, including all testimony, shall be recorded verbatim stenographically or by mechanical means, and at the request of either party shall be transcribed. If the record of the proceedings, or any part thereof, is transcribed at the request of the prosecuting attorney, a copy of this transcript shall be furnished free of cost to defendant or his counsel.

(5) *Action on Hearing.* If from the evidence it appears to the magistrate that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the magistrate shall cause the defendant to be held to answer to the circuit court; otherwise, the magistrate shall release the defendant from custody unless an information or indictment has been filed, in which event the defendant shall be released on his or her own recognizance subject to the condition that he or she appear at all court proceedings, or shall be released under a summons to appear before the appropriate court at a time certain. Such release does not, however, void further prosecution by information or indictment but does prohibit any restraint on liberty other than appearing for trial.

A finding that probable cause does or does not exist shall be made in writing, signed by the magistrate, and, together with the evidence received in the cause, shall be filed with the clerk of the circuit court.

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Choctawhatchee Electric Cooperative (Chelco).[1]

The record reflects that the Commission has not departed from the essential requirements of law in its ruling in this cause.

Accordingly, the petition for writ of certiorari is denied.

It is so ordered.

ENGLAND, C. J., and ADKINS, OVERTON, SUNDBERG and ALDERMAN, JJ., concur.

In re TRANSITION RULE 23 COMPETENCY TO STAND TRIAL AND BE SENTENCED: INSANITY AS A DEFENSE.

No. 57826.

Supreme Court of Florida.

Oct. 9, 1979.

Case of Original Jurisdiction.

PER CURIAM.

Jurisdiction to adopt rules of practice and procedure is vested in this Court. Art. V, section 2(a), Fla.Const. Pursuant to this authority we hereby adopt as a Court Rule those portions of chapter 79-336, Laws of Florida, which are procedural in nature.

We also adopt as Transition Rule 23(a) the following:

Rule 3.210(a). At the initial hearing held pursuant to Fla.Stat. 394.962, the court shall consider the following issues:

a. Whether the defendant is competent to stand trial;

b. If it is determined by the court that the defendant is not competent to stand trial, whether the defendant meets the criteria for involuntary hospitalization.

If the issue of sanity at the time of the offense has been raised by the defendant, the court may order that the examination of the defendant by expert witnesses to determine competency to stand trial include an examination of the defendant to determine his sanity at the time of the offense.

The Court also adopts as Transition Rule 23(b) former Florida Rules of Criminal Procedure 3.210(e), sections (1) through (8).

This transition rule is adopted as a temporary measure pending a final recommendation from the Criminal Rules Committee of the Florida Bar.

It is so ordered.

ENGLAND, C. J., and ADKINS, BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., concur.

1. We have jurisdiction. Art. V, § 3(b)(7), Fla. Const.; § 366.10, Fla.Stat. (1977).

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112.191 State law enforcement officers retirement award.--

(1) Each state agency which employs law enforcement officers is authorized to present to each such employee who retires under any provision of a state retirement system, including medical disability retirement, one complete uniform including the badge worn by him, the employee's service revolver, if one had been issued as part of the employee's equipment, and an identification card clearly marked "RETIRED".

(2) Upon the death of a law enforcement officer, the employing agency is authorized to present to the spouse or other beneficiary of the employee, upon request, one complete uniform, not including a service revolver.

(3) Each uniform and badge presented under this section are to commemorate prior service and shall be used only in such manner as the employing agency shall prescribe by rule.

Section 2. Subsection (3) of section 321.07, Florida Statutes, is hereby repealed.

Section 3. This act shall take effect upon becoming a law.

Approved by the Governor July 3, 1979.

Filed in Office Secretary of State July 5, 1979.

CHAPTER 79-336

Senate Bill No. 110

An act relating to mental health; redesignating part V of chapter 394, Florida Statutes, and transferring thereto provisions of law relating to persons found not guilty by reason of insanity and persons incompetent to stand trial; creating s. 394.901, Florida Statutes, changing the criteria for involuntary admission of persons adjudicated not guilty by reason of insanity; transferring existing provisions relating to procedures for continued hospitalization and release of such persons from part I of chapter 394, Florida Statutes; renumbering and amending s. 918.15, Florida Statutes, transferring to part V of chapter 394 provisions relating to mental incompetence to stand trial; renumbering and amending s. 925.10, Florida Statutes, specifying the experts to evaluate a defendant whom the court has reasonable grounds to believe to be incompetent to stand trial for the purpose of making certain determinations; providing that the applicable statute of limitations shall toll during the period of incompetency; transferring from s. 918.11, Florida Statutes, provisions relating to fees for expert witnesses appointed to evaluate the defendant; creating s. 394.904, Florida Statutes, providing that defendants made competent by psychotropic medication shall not automatically be prohibited from standing trial; amending subsections (1) and (6) of s. 394.467, Florida Statutes, relating to commitment criteria and release

of certain people, and repealing subsections (1)(b) and (5) of said section, to conform to the act; repealing s. 916.11, Florida Statutes, to conform to the act; repealing a conflicting rule of criminal procedure; providing a severability clause; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. The title of part V of chapter 394, Florida Statutes, is renamed "Criminal Mental Health." Section 394.851, Florida Statutes, is renumbered as section 394.905, Florida Statutes, section 394.86, Florida Statutes, (former section 394.4677), is renumbered as section 394.906, Florida Statutes, sections 916.15 and 916.16, Florida Statutes, are renumbered and amended, and sections 394.901 and 394.904, Florida Statutes, are created to read:

394.901 Involuntary hospitalization of persons adjudicated not guilty by reason of insanity.--

(1) CRITERIA.--A person who is acquitted of criminal charges because of a finding of not guilty by reason of insanity may be involuntarily hospitalized pursuant to such finding if he is mentally ill and, because of his mental illness, is manifestly dangerous to himself or others.

(2) PROCEDURE FOR ADMISSION.--Any court order directing the hospitalization of a person adjudicated not guilty by reason of insanity shall adequately document the nature and extent of the patient's mental illness. Such documentation shall include a psychiatric evaluation. In addition, other documentation may be provided, to the extent possible, by at least one state employed psychiatrist, psychologist, or physician, psychiatrist, psychologist or physician as designated by the district mental health board, or a community mental health center psychiatrist, psychologist or physician. Every person acquitted of criminal charges by reason of insanity shall be admitted for hospitalization and treatment in accordance with the provisions of this section. The treatment facility may accept and retain a patient so admitted for a period not to exceed 6 months whenever the patient is accompanied by a court order and adequate documentation of the patient's mental illness. Such documentation shall include a psychiatric evaluation and any psychological and social work evaluations of the patient and shall document the results of any criminal investigation on the patient. If further hospitalization is necessary at the end of the patient's authorized treatment period, the administrator shall apply to the hearing examiner for an order authorizing continued hospitalization.

(3) PROCEDURE FOR CONTINUED HOSPITALIZATION; HEARING OFFICER.--

(a) If continued hospitalization of a patient admitted pursuant to this section is necessary, the administrator shall, prior to the expiration of the period during which the treatment facility is authorized to retain the patient, request an order authorizing continued hospitalization. This request shall be accompanied by a statement from the patient's physician justifying the request and a brief summary of the patient's treatment during the time he was hospitalized. In addition, the administrator shall submit an individualized plan for the patient for whom continued hospitalization is requested. Notification of this request for retention shall be mailed to the patient and his guardian or

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representative along with a completed petition for a hearing regarding the continued hospitalization and a waiver of hearing form. The waiver of hearing form shall state that the patient is entitled to a hearing under the law; that he is entitled to be represented by an attorney at the hearing and, if he cannot afford an attorney, one will be appointed; and that, if it is shown at the hearing that the patient does not meet the criteria for involuntary hospitalization specified in subsection (1), he is entitled to be released. If the patient or his guardian or representative does not file the petition, or if the waiver is not returned within 5 days, the hearing officer shall notice a hearing with regard to the patient involved in accordance with s. 120.57(1).

(b) Any time continued hospitalization is requested, the hearing officer may, on his own motion, notice a hearing.

(c) Any time continued hospitalization is requested by the administrator, the administrator may request a hearing, and the hearing officer shall hold a hearing within 10 days of such request.

(d) The administrator shall not transfer any patient to voluntary status when he has reasonable cause to believe that the patient is manifestly dangerous to himself or others. In any case in which the administrator has reasonable cause to believe that an involuntary patient is manifestly dangerous to himself or others, the administrator shall request continued hospitalization. In any case in which a request for continued hospitalization is made, but the administrator after reviewing the case believes there is not reasonable cause to believe that the patient meets the criteria for involuntary hospitalization at the time of application for transfer to voluntary status and the patient needs continued hospitalization, the patient shall be transferred to a voluntary status.

(e) If the patient or his guardian or representative returns the signed petition noted in paragraph (a), the hearing officer shall notice a hearing in accordance with s. 120.57(1). The patient and his guardian or representative shall be informed of the right to counsel by the hearing officer. In the event a patient cannot afford counsel in a hearing before a hearing officer, the public defender of the county where the hearing is to be held shall act as attorney for the patient. The hearing shall be conducted in accordance with chapter 120.

(f) If the hearing is waived or if at a hearing it is shown that the patient continues to meet the criteria for involuntary hospitalization, the hearing officer shall sign the order for continued hospitalization. The treatment facility shall be authorized to retain the patient for a period not to exceed 1 year. The same procedure shall be repeated prior to the expiration of each additional 1-year period the patient is retained.

(4) RELEASE OF PATIENTS COMMITTED PURSUANT TO AN ACQUITTAL BY REASON OF INSANITY.--

(a) The committing court shall retain jurisdiction in the case of any patient committed to a mental hospital pursuant to this section.

(b) The administrator shall not release any such patient without first notifying the state attorney from the committing county at least 30 days in advance of the anticipated date of release. The state attorney may request a hearing before a hearing officer to be

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held within 15 days. A continuance not to exceed 5 days may be granted at the discretion of the hearing officer. The state attorney from the committing county shall represent the interest of the state at such hearing. The patient and his guardian or representative shall be informed of the right to counsel by the hearing officer. In the event a patient cannot afford counsel in a hearing before a hearing officer, the public defender in the county where the patient is being held or a court-appointed attorney shall act as attorney for the patient. If, at a hearing, it is shown that the patient continues to meet the criteria for involuntary hospitalization specified in subsection (1), the hearing officer shall sign the order for continued hospitalization pursuant to paragraph (1)(f). If, at a hearing, it is shown that the patient does not continue to meet such criteria for involuntary hospitalization, the hearing officer shall sign an order allowing the release of the patient. However, no patient who has been committed in a criminal case shall be released from a mental hospital except by order of the committing court.

(c) In all proceedings under this subsection, both the patient and the state attorney shall have the right to a hearing before the committing court. In these proceedings, evidence may be presented by the hospital administrator, the state attorney, and the patient. The patient shall have the right to counsel. In the event a patient cannot afford counsel, the public defender of the county in which the proceedings arise or court-appointed counsel shall act as attorney for the patient. After hearing all the evidence, the judge shall deliberate and render a decision based exclusively on whether the patient continues to meet the criteria for involuntary hospitalization specified in subsection (1). If the patient does not meet the criteria, the judge shall find that the patient should be released. The hearing provided for herein shall be held within 60 days from the date of the request for such hearing; otherwise the patient shall be released in accordance with the order of the hearing officer.

(5) CONDITIONAL RELEASE OF INSANITY ACQUITTEE PATIENTS.--In the case of any patient who has been committed according to the provisions of this section, the committing court may order a conditional release based on an appropriate system of community follow-up, and such release shall specify responsibility for the receipt of follow-up treatment and reports to the court for failure to comply with the order of the court. In such case the court shall order the patient to appear periodically in a community clinic to insure the patient is following a prescribed treatment regimen.

394.902 ~~918.15~~ Mental competence to stand trial.--

(1) A person accused of a crime who is incompetent to stand trial shall not be proceeded against while he is incompetent. A person is incompetent to stand trial within the meaning of this act if he does not have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or if he has not rational, as well as factual, understanding of the proceedings against him.

(2) If, before or during trial, the court, of its own motion or upon motion of counsel for the defendant or for the state, has reasonable ground to believe that the defendant is not mentally competent to stand trial, the court shall immediately initiate proceedings pursuant to s. 394.903 ~~925.10~~.

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(3) If a motion under subsection [(2)] is filed or made, the court may order the defendant taken into custody, if he is not already in custody, until the determination of his competency can be made. If the defendant has been released from custody on bail or other pretrial release provision, and the court is satisfied that evaluation is necessary but that the defendant need not be taken into custody for such evaluation, the court may order the defendant to appear at a designated place for evaluation at a specific time.

394.903 ~~925.19~~ Procedure when defendant is incompetent to stand trial.--If the court has reasonable ground to believe the defendant is incompetent to stand trial, pursuant to the provisions of s. 394.902 ~~916.15~~, the court shall proceed as follows:

(1)(a) The court shall issue an order for the defendant to be examined by at least three expert witnesses ~~a--local--mental--health receiving--facility--or--a--local--retardation--diagnostic--and--evaluation team~~ to determine whether the defendant does or does not meet the criteria for involuntary hospitalization pursuant to s. 394.467(1) or the criteria for involuntary retardation residential services pursuant to s. 393.11. To the extent possible, at least one of the appointed experts shall be either a state-employed psychiatrist, psychologist or physician, if in the local vicinity, a psychiatrist, psychologist or physician as designated by the district mental health board, of a community mental health center psychiatrist, psychologist or physician. The examination shall be conducted prior to the transmittal of the defendant to a forensic unit of a state treatment facility. If the defendant requires security which the receiving facility ~~or--diagnostic--and--evaluation--team~~ cannot provide, the panel of experts ~~the--receiving--facility--or--diagnostic--and--evaluation--team~~ may evaluate the defendant in jail or in another appropriate secure local facility. The receiving facility ~~or--diagnostic--and--evaluation team~~ shall complete its court-ordered evaluation of the defendant within 5 days of receipt of the order.

(b) ~~(a)~~ The court shall conduct a hearing to determine whether the defendant meets the criteria for involuntary hospitalization or residential services.

1. If the court finds the defendant meets the criteria for involuntary hospitalization or residential services, the court shall order the defendant committed to a Department of Health and Rehabilitative Services intake facility. The defendant shall be diagnosed and examined within 30 days of his admission to such facility to evaluate his competency to participate in his own defense. Appropriate treatment shall be provided to the defendant. Within the 30-day period, a hearing shall be held by the court of criminal jurisdiction to determine if the defendant is competent to participate in his own defense. The staff of the treatment facility may ~~shall~~ present testimony at the hearing on the defendant's competency to participate in his own defense. Other evidence concerning the defendant's mental condition for participating in his own defense may be introduced at the hearing by either party; provided that if the court orders an additional examination of the defendant prior to the hearing, it shall appoint at least three expert witnesses to evaluate and diagnose the competence of the defendant and, to the extent possible, at least one of the experts shall be a psychiatrist or psychologist specified in paragraph (a).

a. If, at the hearing, the court determines the defendant competent to stand trial, the court shall proceed to trial.

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b. If, at the hearing, the court determines the defendant incompetent to stand trial, the defendant shall be returned to the treatment facility for an additional stay not to exceed 60 days. Within the 60-day stay, another competency hearing shall be held. If, after three consecutive 60-day treatment periods, the defendant remains incompetent, the court may dismiss all charges and order an involuntary admission hearing as provided in s. 393.11 or s. 394.467. If the defendant is involuntarily admitted, prior to releasing the defendant, the administrator of the facility shall notify the State Attorney's office which was involved in the adjudication of the original criminal case.

2. If the court finds the defendant does not meet the criteria for hospitalization, the court shall~~, according to the provisions of s. 916.115,~~ appoint at least three expert witnesses for the purpose of evaluating and diagnosing the competence of the defendant. At least one of the experts shall be a psychiatrist or psychologist specified in paragraph (a). The court may utilize the experts who examined the defendant pursuant to paragraph (a) or the staff of the local mental health receiving facility as expert witnesses whenever possible. The clerk shall notify the prosecuting attorney and counsel for the defendant of such appointments and shall give the names and addresses of experts so appointed. Other evidence concerning the defendant's competence may be introduced at the hearing by either party. The hearing shall be held within 5 days of the appointment of the experts. If the defendant is not in custody, the court may order that he be taken into custody until a determination of his competency can be made. If the court is satisfied that evaluation is necessary but that the defendant need not be taken into custody for such evaluation, the court may order the defendant to appear at a designated place for evaluation at a specific time.

a. If, at the hearing, the court determines the defendant competent to stand trial, the court shall proceed to trial.

b. If, at the hearing, the court determines the defendant incompetent to stand trial, the defendant may be released on reasonable bail or on other appropriate release conditions for a period not to exceed 6 months. The court may order that the defendant receive outpatient treatment at an appropriate local facility to restore the defendant's competency. The court shall conduct a hearing to determine whether the defendant has regained his competency within 30 days of the initial commitment and every 60 days thereafter until the defendant either regains his competency to proceed with trial or until the defendant has received outpatient services for 6 months. If at the end of the 6-month period the defendant remains incompetent, the court may dismiss all charges against the defendant.

(c)~~(b)~~ If the defendant is declared incompetent to stand trial and the criminal charges are dismissed, and [he is] later declared competent to stand trial, his other incompleted trial shall not constitute former jeopardy. The statute of limitations applicable to the criminal charges which are dismissed shall be tolled during the period the person is declared incompetent to stand trial.

(2) An adjudication of incompetency to stand trial shall not operate as an adjudication of incompetency for purposes of civil proceedings, unless such adjudication is specifically set forth in the order, in which case a guardian of the person shall be appointed.

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(3) Expert witnesses appointed by the court pursuant to this section to determine the mental condition of a defendant in a criminal case shall be allowed reasonable fees for services rendered as witnesses, which shall be paid by the county where the indictment was found or the information or affidavit was filed. State employees shall be paid expenses pursuant to s. 112.061. The fees shall be taxed as costs in the case.

394.904 Competence to stand trial; psychotropic medication.--

(1) As used in this section, the term "psychotropic medication" means any drug or compound affecting the mind, behavior, intellectual functions, perception, moods, and emotion and includes antipsychotic, antidepressant, antimanic, and antianxiety drugs.

(2) A defendant who, because of psychotropic medication, is able to understand the nature of the proceedings and to assist in his defense, shall not automatically be deemed incompetent to stand trial simply because his satisfactory mental functioning is dependent upon the medication.

Section 2. Paragraph (b) of subsection (3) of section 394.467, Florida Statutes, as amended by chapters 77-147, 77-312 and 78-197, Laws of Florida, subsection (5) of said section, as amended by chapters 77-312, 78-95 and 78-197, Laws of Florida are hereby repealed; subsections (1) and (6) of said section, as created by chapter 77-312, Laws of Florida, are amended:

394.467 Involuntary hospitalization.--

(1) CRITERIA.--

(a) A person who is acquitted of criminal charges because of a finding of not guilty by reason of insanity may be involuntarily hospitalized pursuant to such finding if he is mentally ill and because of his illness is manifestly dangerous to himself or others pursuant to s. 394.931.

(b) Any other person may be involuntarily hospitalized if he is mentally ill and because of his illness is:

1.~~(a)~~ Likely to injure himself or others if allowed to remain at liberty, or

2.~~(b)~~ In need of care or treatment and lacks sufficient capacity to make a responsible application on his own behalf.

~~(5)~~(6) CONDITIONAL RELEASE OF CRIMINALLY CHARGED OR CONVICTED PATIENTS.--In the case of any patient who has been committed according to the provisions of s. 394.903 ~~925.11~~ or s. 945.12, upon release the committing court may order a conditional release based on that an appropriate system of community follow-up be utilized, in which case the court may order the patient to appear periodically in a community clinic to insure the patient is following a prescribed treatment regimen.

Section 3. Section 918.11, Florida Statutes, as amended by chapter 77-312, Laws of Florida, is hereby repealed.

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Section 4. If this act is passed by a two-thirds vote of the membership of each House of the Legislature, Rule 3.210, Florida Rules of Criminal Procedure, as amended, is repealed.

Section 5. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

Section 6. This act shall take effect October 1, 1979.

Approved by the Governor July 3, 1979.

Filed in Office Secretary of State July 5, 1979.

CHAPTER 79-337

Committee Substitute for Senate Bill No. 162

An act relating to group insurance for public officers and employees; amending s. 112.08(1), Florida Statutes; and adding a new subsection; authorizing local governmental units to provide for insurance for the dependents of officers or employees; authorizing the commingling of insurance payments; providing for the determination and fixing of the portion of the cost of the fund, plan, or program to be paid by an officer or employee; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (1) of section 112.08, Florida Statutes, is amended, subsections (2) through (4) are renumbered as subsections (3) through (5), respectively, and a new subsection (2) is added to said section to read:

112.08 Group insurance for public officers and employees; certain volunteers.--

(1) Every local government unit is hereby authorized to provide and pay out of its available funds for all or part of the premium for life, health, accident, hospitalization, or annuity insurance, or all [or] any kinds of such insurance, for the officers and employees of the unit and for health, accident, and hospitalization insurance for their dependents, upon a group insurance plan and, to that end, to enter into contracts with insurance companies or professional administrators to provide such insurance. Before entering any contract for insurance, the governmental unit shall advertise for competitive bids, and such contract shall be let upon the basis of such bids. However, the governmental unit may undertake simultaneous negotiations with those companies [which] have submitted reasonable and timely bids and which are found by the governmental unit to be fully qualified and capable of meeting all servicing requirements. Each county, municipality, school board, local governmental unit, and special taxing district of the state may self-insure any plan for health, accident, and hospitalization coverage, subject to approval based on actuarial soundness by the Department of Insurance. Each shall contract with an insurance company or professional

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evant evidence is evidence tending to prove or disprove a material fact.

History.—s. 1, ch. 76-237; s. 1, ch. 77-174; s. 22, ch. 78-361; s. 1, ch. 78-379.

90.402 Admissibility of relevant evidence.—All relevant evidence is admissible, except as provided by law.

History.—s. 1, ch. 76-237; s. 1, ch. 77-174; s. 22, ch. 78-361; s. 1, ch. 78-379.

90.403 Exclusion on grounds of prejudice or confusion.—Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. This section shall not be construed to mean that evidence of the existence of available third party benefits is inadmissible.

History.—s. 1, ch. 76-237; s. 1, ch. [illegible]; s. 22, ch. 78-361; s. 1, ch. [illegible].

90.404 Character evidence; when admissible.—

(1) CHARACTER EVIDENCE GENERALLY.—Evidence of a person's character or a trait of his character is inadmissible to prove that he acted in conformity with it on a particular occasion, except:

(a) *Character of accused.*—Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the trait.

(b) *Character of victim.*—

1. Except as provided in s. 794.022, evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the trait; or

2. Evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the aggressor.

(c) *Character of witness.*—Evidence of the character of a witness, as provided in ss. 90.608-90.610.

(2) OTHER CRIMES, WRONGS, OR ACTS.—

(a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

(b)1. When the state in a criminal action intends to offer evidence of other criminal offenses under paragraph (a), no fewer than 10 days before trial, the state shall furnish to the accused a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an indictment or information. No notice is required for evidence of offenses used for impeachment or on rebuttal.

2. When the evidence is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.

(3) Nothing in this section affects the admissibility of evidence under s. 90.610.

History.—s. 1, ch. 76-237; s. 1, ch. 77-174; s. 22, ch. 78-361; s. 1, ch. 78-379.

90.405 Methods of proving character.—

(1) REPUTATION.—When evidence of the character of a person or of a trait of his character is admissible, proof may be made by testimony about his reputation.

(2) SPECIFIC INSTANCES OF CONDUCT.—When character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may be made of specific instances of his conduct.

History.—s. 1, ch. 76-237; s. 1, ch. 77-174; s. 22, ch. 78-361; s. 1, ch. 78-379.

90.406 Routine practice.—Evidence of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is admissible to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice.

History.—s. 1, ch. 76-237; s. 1, ch. 77-174; s. 22, ch. 78-361; s. 1, ch. 78-379.

90.407 Subsequent remedial measures.—Evidence of measures taken after an event, which measures if taken before it occurred would have made the event less likely to occur, is not admissible to prove negligence or culpable conduct in connection with the event.

History.—s. 1, ch. 76-237; s. 1, ch. 77-174; s. 22, ch. 78-361; s. 1, ch. 78-379.

90.408 Compromise and offers to compromise.—Evidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value.

History.—s. 1, ch. 76-237; s. 1, ch. 77-174; s. 22, ch. 78-361; s. 1, ch. 78-379.

90.409 Payment of medical and similar expenses.—Evidence of furnishing, or offering or promising to pay, medical or hospital expenses or other damages occasioned by an injury or accident is inadmissible to prove liability for the injury or accident.

History.—s. 1, ch. 76-237; s. 1, ch. 77-174; s. 22, ch. 78-361; s. 1, ch. 78-379.

90.410 Offer to plead guilty; nolo contendere; withdrawn pleas of guilty.—Evidence of a plea of guilty, later withdrawn; a plea of nolo contendere; or an offer to plead guilty or nolo contendere to the crime charged or any other crime is inadmissible in any civil or criminal proceeding. Evidence of statements made in connection with any of the pleas or offers is inadmissible, except when such statements are offered in a prosecution under chapter 837.

History.—s. 1, ch. 76-237; s. 1, ch. 77-174; s. 22, ch. 78-361; s. 1, ch. 78-379.

90.501 Privileges recognized only as provided.—Except as otherwise provided by this chapter, any other statute, or the Constitution of the United States or of the State of Florida, no person in a legal proceeding has a privilege to:

(1) Refuse to be a witness.

(2) Refuse to disclose any matter.

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RECEIVED
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SUPREME COURT, U.S.

NO. A-348

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RICHARD KING, 83-5940

Petitioner

v.

THE STATE OF FLORIDA,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The Petitioner, RICHARD KING, by and through his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Florida without prepayment of costs and to proceed in forma pauperis, pursuant to Rule 46. At trial and on appeal, lawyers were appointed to represent him because he was indigent. In support of such motion attached hereto, is the Affidavit of undersigned counsel and Affidavit of Petitioner.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 15th day of December, 1983, to Mark C. Menser, Esquire, Assistant Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014.

WARREN H. EDWARDS, ESQUIRE
Suite 101, Bradshaw Building
65 North Orange Avenue
Orlando, Florida 32801
(305) 425-7676
Attorney for Petitioner

NO. A-348

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

83-5940

RICHARD KING,

Petitioner

v.

THE STATE OF FLORIDA,

Respondent.

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF ORANGE

BEFORE ME, the undersigned authority, personally appeared WARREN H. EDWARDS, ESQUIRE, and after first being duly sworn deposes and says:

1. That he is the attorney for Richard King, the Petitioner in the above styled cause, and he makes this Affidavit in support of Mr. King's Motion for Leave to Proceed in Forma Pauperis.

2. That his representation of Mr. King is without renumeration.

3. That counsel was appointed to represent Mr. King on his appeal to the Supreme Court of Florida.

4. That he is informed, and believes that because of Petitioner's poverty, that Mr. King is unable to pay the cost of this cause or to give any security for same.

5. That he believes that Mr. King is entitled to redress in this action.

WARREN H. EDWARDS, ESQUIRE
Suite 101, Bradshaw Building
65 North Orange Avenue
Orlando, Florida 32801
(305) 425-7676
Attorney for Petitioner

Sworn to and subscribed before me this 15th day of December, 1983.

Dianne Southwell
NOTARY PUBLIC
My Commission Expires:
NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES JUNE 6, 1987

NO. 80-59,464

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RICHARD KING,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF

BEFORE ME, the undersigned authority, personally appeared RICHARD KING, and after first being duly sworn, deposes and says, in support of his motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. That he is the petitioner in the above captioned cause.

2. That because of his poverty, he is unable to pay the costs of said cause; that he owns no real or personal property; that he is incarcerated and receives no income from earnings.

3. That he is unable to give security for said cause.

4. That counsel is serving on his behalf without renumeration. At trial and on appeal, lawyers were appointed to represent him because he was indigent.

5. That he believes that he is entitled to redress.

6. That the nature of said cause is briefly stated as follows:

That he was convicted in the Circuit Court of Orange County, trial court in the State of Florida of Murder in the First Degree and was sentenced to death. That he is being held in the Florida State Prison, Starke, Florida. I believe that errors were committed during the course of his trial in violation of his constitutional rights and that his conviction

and death sentence were imposed upon him in violation of his constitutional rights.

Richard King
RICHARD KING

STATE OF FLORIDA
COUNTY OF Bradford

Sworn to and subscribed before me this 21 day of November, 198

J. W. Warren
NOTARY PUBLIC

My Commission Expires:

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Oct. 4, 1985

83-5940

ORIGINAL

NO. A-348

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

RECEIVED
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SUPREME COURT, U.S.

RICHARD KING,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

RESPONSE TO
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

JIM SMITH
ATTORNEY GENERAL

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue, 4th Fl
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether certiorari should be granted for the purpose of reweighing the evidence adduced at trial.

2. Whether certiorari should be granted to review "federal questions" which were not raised during trial.

3. Whether certiorari should be granted to review state court rulings grounded upon adequate foundations of state law.

4. Whether certiorari should be granted to revisit Petitioner's federal claims absent any deviation from established guidelines or any "special and important" reasons therefor.

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OTHER AUTHORITY

NO. A-348

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

RICHARD KING,
Petitioner,
vs.
THE STATE OF FLORIDA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

The Respondent, State of Florida, respectfully suggests that the Petition for Writ of Certiorari should be denied.

OPINION BELOW

The Petitioner's statement is accepted.

JURISDICTION

The petition at bar is presented pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner's statement is accepted.

STATEMENT OF THE CASE

Richard King was convicted of first degree murder and sentenced to death, as noted in his petition. Peggy Burnside, the victim, was the second girlfriend of Mr. King to be killed by him.

The Petitioner appealed his conviction and sentence to the Supreme Court of Florida, without success. This petition for certiorari is a simple renewal of the grounds argued in the Supreme Court of Florida.

The facts relevant to each claim shall be set forth in order.

FACTS: ARGUMENT I

At no time did Mr. King plead insanity or allege incompetence to stand trial. No claim of any deprivation of any sixth or fourteenth amendment right was argued to the trial court.

Mr. King attempted to wrest control of his defense from his lawyer, Mr. Tabscott. King demanded all depositions be given to him for review and argued over witnesses. Ultimately, King tried to "fire" Tabscott, asking the court to relegate counsel to the role of "advisor." (R 3-19) This proposal was rejected.

Although King himself admitted full awareness of the charges and seriousness of the case, and was actively involved in his defense, his hostile conduct prompted the trial court to order a psychiatric evaluation.

Three psychiatrists examined King, finding him to be "sane," "alert," "coherent," "informed" and <u>able</u> (if not willing) to assist counsel (R 2535-39). At no time did any expert change or withdraw his opinion.

King asked the Supreme Court of Florida to re-weigh the expert testimony, reject the expert's own conclusions, and, essentially, form its own opinion. This request was denied, and King now seeks re-evaluation by this Honorable Court.

FACTS: ARGUMENT II

Counsel for the State and the defense stipulated to the exclusion of jurors biased for or against capital punishment (R 23). Four veniremen biased against capital punishment were excused without any Witherspoon objection. Three jurors biased in favor of capital punishment were excused, even though one of them insisted he would vote for a life sentence if the facts warranted one.

FACTS: ARGUMENT III

Mr. King was never a suspect in the Burnside murder. He was not being sought by the police. Mr. King fled from Orlando to the City of Daytona Beach where, after a change of heart, he surrendered himself to that city's police, freely confessing.

The officers to whom he surrendered were summoned on another call and thus were not present when the officers arrived from Orlando.

King at first wanted a lawyer, but when the Orlando deputies said they only wanted to know what King had already told the Daytona police, King agreed to speak (R 763,764).

King gave a third, exculpatory, statement later; (R 1006-1019) also, he testified at trial.

King's motion to suppress was denied, as was his appeal.

FACTS: ARGUMENT IV

King appealed the introduction of one of the photographs of the victim, but not all of the photographs. No federal claim was ever argued to the trial court.

King also appealed the admission of testimony relative to the issue of premeditation and the relationship between Burnside and himself. No federal claim was raised at trial.

FACTS: ARGUMENT V

Despite confessing to the crime, King sought to set up the victim's husband as an "alternative suspect." To accomplish this end, King wanted to ask Mr. Burnside if (and why) he ever invoked the fifth amendment.

This knowing presentation of false evidence was disallowed by the trial court and summarily rejected on appeal.

FACTS: ARGUMENT VI

Mr. King would like this court to review the sufficiency of the evidence in general and decide whether his motion for judgment of acquittal should have been granted.

FACTS: ARGUMENT VII, VIII

(No factual issues).

FACTS: ARGUMENT IX

Mr. King would like this court to simply reweigh the evidence supporting the sentence imposed.

SUMMARY OF ARGUMENT

It is suggested that certiorari should be denied for several reasons, including Petitioner's improper request for de novo factual determinations; his failure to adequately raise federal questions in state court; his improper request for a second appeal on non-federal issues; and his failure to allege or show a proper or sufficient basis to prompt this Honorable Court's exercise of jurisdiction.

ARGUMENT

I

CERTIORARI SHOULD NOT BE GRANTED FOR THE PURPOSE OF REWEIGHING THE EVIDENCE ADDUCED AT TRIAL.

The Petitioner asks this Honorable Court to substitute its own findings of fact for those of the trial judge and jury. It is respectfully submitted that certiorari review does not exist to allow continuous reargument regarding the weight of the evidence or the credibility of the witnesses. Sumner v. Mata, ___U.S. ___, 102 S.Ct. 1303 (1982); Mobil Oil Corp. v. F.P.C., 417 U.S. 283, 94 S.Ct. 2328 (1974); United States v. Johnston, 268 U.S. 220, 45 S.Ct. 496 (1925).

Mr. King takes certain observations by the three court appointed psychiatrists out of context and asks this Honorable Court to find that these doctors "did not mean it" when they said he was alert, lucid, coherent and capable of assisting counsel. Then, relying again on cold transcripts, he asks for the reweighing of the testimony of police officers (during suppression hearings) and veniremen (during voir dire). At no time does Mr. King address the recognized prohibitions against "reweighing evidence on appeal." See Tibbs v. State, 397 So.2d 1120 (Fla. 1981), 454 U.S. 1122, 102 S.Ct. 2211 (1982).

Most untenable of all is his claim that the denial of his motion for judgment of acquittal should be reviewed. In ruling upon these motions, trial judges do not sit as neutral "triers of fact." Rather, they simply decide whether the case is sufficient to go to a jury if every fact and every inference is taken in the State's favor. See Rose v. State, 425 So.2d 521 (Fla. 1982), cert. denied 103 S.Ct. 1883 (1983).

ARGUMENT

II

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW "FEDERAL QUESTIONS" WHICH WERE NOT RAISED DURING TRIAL.

In Mr. King's appeal to the Supreme Court of Florida, passing reference was made to various sections of the Constitution. The trial court, however, was never presented with an opportunity to consider federal claims regarding any of the following:

1. The issue of King's competence. (In fact, King never alleged or argued incompetence prior to his appeal).

2. The issue of the admission of photographs or the issue of King's right to present "false" evidence incriminating an innocent man.

3. The issue of the admission of evidence of "prior acts or misconduct."

4. The merits of King's motion for judgment of acquittal.

5. The weight to be afforded the evidence adduced during the sentencing phase.

It is submitted that mere passing references to the Constitution of the United States in an appellate brief does not overcome the Petitioner's failure to afford the trial court an opportunity to rule on the proposed "federal questions." The Respondent is unaware of any jurisdiction which permits waiver of argument at trial and de novo argument on appeal, absent fundamental error (which was not alleged here).

Indeed, simply because certain state laws and state court opinions duplicate or even follow federal standards, reference to these state authorities will not suffice to preserve the federal questions (perceived later) for appellate review. Anderson v. Harless, ___U.S. ___, 103 S.Ct. 276 (1982); Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955 (1962); See Engle v. Isaac, ___U.S.___, 102 S.Ct. 1558 (1982).

Also, where adequate, independent, state and federal grounds exist for a state court ruling, it is not presumed that the federal question provided the basis for the decision. Grayson v. Harris, 267 U.S. 352, 45 S.Ct. 317 (1925).

The decisions of the trial court were based upon the weight of the evidence and upon the laws of Florida, including Florida's evidence code. The Supreme Court of Florida summarily disposed of most of the claims raised without reference to any federal ground. That would be in keeping with Florida's appellate prohibition against de novo claims on appeal. See Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977).

Inasmuch as Mr. King did not present federal questions to the trial court on any issues other than those discussed below; and absent any ruling on any alleged federal question by the Florida Supreme Court, it is respectfully suggested that certiorari not be granted.

ARGUMENT

III

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW STATE COURT RULINGS GROUNDED UPON ADEQUATE FOUNDATIONS OF STATE LAW.

Mr. King seeks review of certain issues of state law, including the admission of photographs and so-called "character" evidence at his trial; a perceived "limitation" of cross examination, denial of his motion for judgment of acquittal and the "failure" of the trial court to order a presentence investigation.

The issues surrounding the admission of photographs and evidence of prior misconduct[1] were summarily rejected. A substantial body of law supported admission of photographs of Mr. King's handiwork. See Swann v. State, 322 So.2d 485 (Fla. 1975); State v. Wright, 265 So.2d 361 (Fla. 1972). The record showed that the trial court rejected many, if not most, of the proffered photographs - thus negating any claim of bias on the court's part. Likewise, Florida law permits the admission of evidence tending to prove modus operandi, bias, motive, lack of mistake and the relationship between the defendant and the victim. See Williams v. State, 110 So.2d 654 (Fla. 1959), 361 U.S. 847 (1959). Where "intent" is an issue, this evidence is admissible.

The Petitioner attempts to argue the impact of Barwicks v. State,[2] 82 So.2d 356 (Fla. 1955). Again, any conflict between Williams and Barwicks represents an issue of state, not federal law.

In a similar vein, no "federal question" rested at the heart of Mr. King's claim that he was not allowed to develop

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1. King beat up the victim twenty-three days before killing her. He killed his first "common law" wife with an ax.

2. Barwicks was argued to Florida's Supreme Court and rejected. That case does not stand for the proposition set forth by King. Rather, it deals with the relevance of an old altercation to claim of self-defense.

a "highly likely alternative suspect," Mr. Burnside.

When someone exercises his fifth amendment privilege, neither Florida nor Federal law allows cross examination or impeachment on that point. See Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257 (1982). Florida, in addition, does not allow counsel to knowingly develop "false" evidence for the purpose of deceiving the jury. Coco v. State, 62 So.2d 892 (Fla. 1953); Fulton v. State, 335 So.2d 280 (Fla. 1976); Rolle v. State, 386 So.2d 3 (Fla. 3d DCA 1980); Fla. Bar Code Prof. Resp. EC 7-26 and DR 7-102(A)(1)(4).

Again, certiorari review would not be proper.

Mr. King challenges the denial of his motion for judgment of acquittal without addressing any relevant Florida law on that point. Motions for judgment of acquittal are creatures of Florida procedural law, not federal law. (These motions are discussed in detail in the preceding section). No federal question exists, and no certiorari review should be granted.

Similarly, the fact that a pre-sentence investigation was not ordered presents an issue of state, not federal, law. In death cases, where the sentencing alternatives are between essentially mandatory sentences (twenty-five year mandatory minimum and/or death), and where a separate evidentiary hearing is held on the sentencing issue, redundant pre-sentence investigations are not required. See Thompson v. State, 389 So.2d 197 (Fla. 1980). This argument was properly rejected without comment by the Supreme Court of Florida, and is not subject to review. Gryger v. Burke, 334 U.S. 728 (1948).

In each of the above referenced instances, claims of error were rejected on the basis of state law, some of which has its origins in federal law. Nevertheless, it is again suggested that state decisions resting upon adequate foundations of state law are not subject to federal review.

Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977).

Certiorari should not be granted.

ARGUMENT

IV

CERTIORARI SHOULD NOT BE GRANTED TO REVISIT PETITIONER'S FEDERAL CLAIMS ABSENT ANY DEVIATION FROM ESTABLISHED GUIDELINES OR ANY "SPECIAL AND IMPORTANT" REASONS THEREFOR.

The "federal questions" that were raised and ruled upon were not disposed of in a manner that conflicts with the decisions of this court or presents a novel issue worthy of certiorari review. See Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822 (1963); Rice v. Sioux City Memorial Park, 349 U.S. 70, 75 S.Ct. 614 (1955).

For example, King challenges a finding by the trial court, upheld on appeal, that he voluntarily spoke to the police. (It must be noted that King would not have been arrested or questioned had he not called the police and turned himself in). King received a full hearing on his fourth, fifth, sixth and fourteenth amendment claims. The Supreme Court of Florida ruled on the basis of Edwards v. Arizona, 451 U.S. 477 (1981), and Michigan v. Mosely, 423 U.S. 96, (1975) that, based upon the facts and circumstances of the case, no violation of federal rights took place. See also Michigan v. Tucker, 417 U.S. 433 (1974).

Mr. King's talkative nature, from his decision to call the police to his fights with defense counsel, to his decision to testify at trial, clearly supports the court's determination.

Mr. King has also raised a Witherspoon claim.[3]

The ability of venireman Kimble to follow the law was analyzed during voir dire. No Witherspoon objection accompanied his discharge. Looking only at cold transcripts, we are not in a position to evaluate his demeanor or credibility.

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3. Again, this claim was not raised at trial (and was not preserved for review) as to any challenged juror.

We do know, however, that pro-death jurors were rejected including Mr. Chapham, who said he might extend mercy despite his pro-death philosophy. Thus, we do not have a record of a court sitting a "hanging jury" or a "death biased" jury. Witherspoon v. Illinois, 391 U.S. 510 (1968); Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788 (1968).[4]

To the court which saw and heard the veniremen, the bias of both Kimble (anti-death) and Chapham (pro death) was obvious and unmistakably clear. They could not be trusted to abide by the law or follow the instructions of the court. Exclusion of these jurors was proper, Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978); Boulden v. Holman, 394 U.S. 478, 89 S.Ct. 1138 (1969), and did violate the dictates of Taylor v. Louisiana, 419 U.S. 522 (1975).

Finally, the constitutionality of Florida's death penalty statute has been recognized in every case before this court since Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2965 (1976). No new or compelling arguments against that statute have been presented to prompt certiorari review.

CONCLUSION

In a lengthy petition, Mr. King has collected a menagerie of arguments relating to the weight of the evidence at trial, state court interpretations of state law, federal claims that were waived at the trial court level, and federal claims that were resolved in a manner consistent with the requirements of this Honorable Court. Mr. King has failed to allege or argue any reason for this Court to amend its

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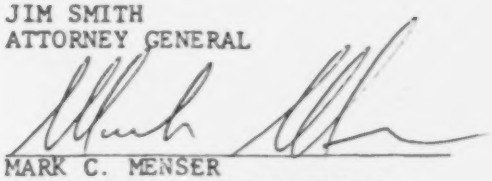
4. This Honorable Court found that the jury in Bumper, which should have been prejudiced in favor of death under the Witherspoon theory, recommended life. This dilemma was overcome by ruling that Witherspoon would not be applied unless the petitioner demonstrated bias. While the jury sub judice suggested death, the record of the voir dire shows balance in the rejection of pro and anti death biased jurors. Absent record prejudice, Bumper should control, prohibiting consideration of any alleged error.

standards for certiorari review and accept his case.

Certiorari should be denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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COUNSEL FOR RESPONDENT

NO. A-348

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RICHARD KING,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE

I, MARK C. MENSER, do hereby certify that I am a member of the Bar of the Supreme Court of the United States, and that I have served a copy of the Response To Petition For Writ Of Certiorari To the Supreme Court Of Florida, Brief For Respondent In Opposition, by depositing same in the United States mail, first class postage prepaid, as follows:

WARREN H. EDWARDS, ESQUIRE
Suite 101, Bradshaw Building
65 North Orange Avenue
Orlando, Florida 32801

All parties required to be served have been served on this 28th day of February, 1984.

Mark C. Menser
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125 North Ridgewood Avenue
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Counsel for Respondent

ORIGINAL

83-5940

No. A-348

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

RICHARD KING,

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THE STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER

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ATTORNEY FOR PETITIONER

Mar. 23 P. 6

QUESTIONS PRESENTED

1. Certiorari should be granted because the Federal Questions that were raised and ruled upon were disposed of in a manner that conflicts with the decisions of this Court.

2. Certiorari should be granted to review federal questions which were not raised during trial where the proper resolution is beyond any doubt or where injustice might otherwise result.

3. The Florida Supreme Court Decision is not based on adequate foundations of State Law.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RICHARD KING,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER

Petitioner, RICHARD KING, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Florida in this case.

Respondent in his Brief for Respondent In Opposition states that this petition for certiorari is a "simple renewal" of the grounds argued in the Supreme Court of Florida. A violation of one's constitutional rights is never a simple issue.

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE FEDERAL QUESTIONS THAT WERE RAISED AND RULED UPON WERE DISPOSED OF IN A MANNER THAT CONFLICTS WITH THE DECISIONS OF THIS COURT.

The Florida Supreme Court's holding should be reviewed as their decision rests on a serious misapprehension of federal constitutional law. The holding in the instant case is clearly at odds with the principles set forth in Miranda and its progeny. The trial court admitted into evidence over Petitioner's timely objections, incriminating statements received by the police after the Petitioner requested an attorney. The record clearly reveals that the petitioner requested an attorney repeatedly, but the questioning continued on under a different guise after each request for an attorney was made. The police officers pursued their investigation and further developed their case against the petitioner by sloughing over his requests for

an attorney by using such ploys as "we're only here to talk to you about what the Detective from Daytona Beach talked to you about" (r. 763) or making a tape for a permanent record (R. 1356).

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), this Court made it clear when the mandate was made:

> "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." Id., at 473-474 (emphasis supplied) (footnote omitted).

The Court in Fare v. Michael C., 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed. 2d 197 (1979), observed that Miranda created a "per se" rule that upon a request for counsel, interrogation must cease until counsel is provided. Id., at 717-719.

Again in Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed. 2d 297 (1980), the Court referred to the "undisputed right" under Miranda to remain silent and to be free of interrogation "until he had consulted with a lawyer" once a suspect in custody had invoked his Miranda right to counsel. The Court reconfirmed the views of Miranda and, "to lend them substance, emphasize[d] that it is inconsistent with Miranda and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." Edwards v. Arizona, 451 U.S. 477, 484-485, 101 S.Ct. 1880, 68 L.Ed. 2d 378 (1981).

The Petitioner relies on Miranda and its progeny and their rigid rule that once a suspect in custody invokes his Miranda right to counsel, the suspect is to be free of interrogation until he has consulted with a lawyer. The record of Petitioner is very clear. Petitioner requested an attorney repeatedly, but such requests were sloughed off by police officers, and the interrogation continued. The Petitioner sought to suppress statements made by him after his invocation of his Miranda rights. The trial court denied Petitioner's Motion to Supress Confessions and Admissions. Incriminating statements made after the invocation of his Miranda rights

were admitted into evidence (R. 766-787) over Petitioner's timely objection (R. 765,770, 787).

Petitioner's case can be distinguished from that of Solem v. Stumes, ___ U.S. ___ (1984). In Solem, the Court stated that the rule established in Edwards, that once a suspect has invoked his right to counsel, further interrogation in counsel's absence is forbidden unless the suspect initiates the conversation with the police, should not be applied retroactively on collateral review of final conviction. In the instant case, at the end of the first interview, Petitioner stated that he did not want to talk about it anymore and the interview was concluded. (R. 729) At the beginning of the second interview after the Petitioner was advised of his Miranda rights and Petitioner exercised his Miranda rights by stating his need for an attorney, but the Orlando Police Officers did not stop the interrogation as they are required to do by the clear mandate of Miranda, the Orlando Police Officers proceeded forward with their interrogation despite Petitioner's initial invocation of his Miranda rights and his subsequent invocations of his Miranda rights during that interrogation. The distinction is that in the instant case, Petitioner asserts and reasserts his requests for an attorney, but these requests are sloughed off by the interrogating officers, whereas in Solem & Edwards, the accused did not keep reasserting his Miranda rights when he was interrogated a second time. There is nothing "voluntary" about Petitioner's actions. Petitioner was incarcerated and requests for an attorney were ignored. For upwards of an hour the Orlando Police Officers questioned the Petitioner after Petitioner had invoked his Miranda rights and extracted incriminating statements from him which were admitted into evidence over Petitioner's timely objection. Such actions by the police are inexcusable and accordingly, this Court should grant certiorari to bring this case in line with the clear mandates of Miranda and its progeny.

This Court has stated that certiorari review should be granted when the federal questions that were raised and ruled upon were dis-

posed of in a manner which conflicts with the decisions of this Court. See Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822 9 L.Ed. 2d 837 (1963), Rice v. Sioux City Memorial Park, 349 U.S. 70, 75 S.Ct. 614 99 L.Ed. 897 (1955). When as in the instant case, the Florida Supreme Court decision rests on a serious misapprehension of the federal constitutional law involving Miranda and its progeny, certiorari should be granted.

II.

CERTIORARI SHOULD BE GRANTED TO REVIEW FEDERAL QUESTIONS WHICH WERE NOT RAISED DURING TRIAL WHERE THE PROPER RESOLUTION IS BEYOND ANY DOUBT OR WHERE INJUSTICE MIGHT OTHERWISE RESULT.

Respondent in his Brief for Respondent in Opposition stated the trial court was never presented with an opportunity to consider federal claims regarding the issues of the admission of photographs and the admission of evidence of prior acts on misconduct. Counsel for Petitioner objected to the introduction of the inflammatory photographs State v. Wright, 265 So. 2d 361 (Fla 1972) (R. 376, 377, 382-385) which the trial court received into evidence (R. 386).

Counsel for Petitioner also moved to exclude (R. 527) testimony of Mae Guantt (R. 539-544), and objected when she did testify (R. 539, 540) on the basis that her testimony was too remote in time, Barwicks v. State, 82 So. 2d 356 (Fla. 1955), and that it could only be constructed to show bad character or propensity toward violent acts by the Petitioner, Williams v. State, 110 So. 2d 654 (Fla. 1959).

The trial also considered Petitioner's Motion for Judgment of Acquittal and denied it at the close of State's case (R. 1039, 1056) and again at the close of all of the evidence (R. 1200). Therefore, Petitioner's denial is a proper subject for this Court to hear on appeal.

The issues were squarely before the trial court and therefore are now subject to review by this Court. Each side had the opportunity to present their side and the trial court made its decision.

The trial court erred in imposing the death penalty on Petitioner as the aggravating circumstances in the capital sentencing were not weighed in an even hand as required by applicable decisions of this Court. Gamer v. Florida, 430 U.S. 349, 97 S.Ct.

1197, 51 L.Ed. 2d 393 (1977) and Woodson v. North Carolina, 428 U.S. 280 96 S.Ct. 2978 49 L.Ed. 2d 944 (1976). Petitioner raised this issue on appeal to the Florida Supreme Court, but that court failed to follow the guidelines set out by this Court, and now certiorari should be granted because the imposition of the death penalty on Petitioner is unconstitutional.

The remaining issue of the federal questions not brought before the trial court is the issue of King's competence. The record is replete with instances in which the Petitioner evidenced various indications of mental order. The Court noted the Petitioner's "mental condition" (R. 19) and counsel for Petitioner noted his observation of mental deterioration prior to the trial. (R. 26) Dr. Edmund Bartlett, Ph.D. indicated that Petitioner had a mental disorder (R. 1510-1512) and that the Petitioner "was not quite as much in touch as I had initially believed." (R. 1516). This Court should grant certiorari to determine whether the failure to find Petitioner incompetent to stand trial violated the Sixth and Fourteenth Amendments of the United States Constitution.

This Court should grant certiorari to determine the federal questions which were not raised at the trial level, because of the grave injustice which would otherwise result, Hormel v.Helvering, 312 U.S. 552, 557, 61 S.Ct. 719, 721, 83 L.Ed. 1037 Singleton v. Wulff, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed. 2d 826 (1976). In the instant case his trial could ultimately deprive Petitioner of his life if this Court does not grant certiorari.

III.

THE FLORIDA SUPREME COURT DECISION IS NOT BASED ON ADEQUATE FOUNDATIONS OF STATE LAW.

Respondent in its brief suggests that the decisions made by the Florida Supreme Court rest on adequate foundations of state law, and therefore are not subject to federal review. This would mean that the decision of the Supreme Court of Florida, if left standing, leaves the Petitioner permanently bound by the Florida Supreme Court on matters of federal constitutional law. This Court has the power to correct state judgments to the extent they incorrectly adjudge federal rights. Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397 97 L.Ed. 469 (1953) Richardson v. Ramirez 418 U.S. 24, 94 S.Ct. 2655

(1974), Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed. 2d 594 (1977).

The Florida Supreme Court summarily disposed of six of the issues before the court. The Florida Supreme Court did not specifically base its reasoning for the disposal of these issues on any state grounds. The reasoning for their denial was not stated and this Court cannot assume, as counsel for Respondent would have this court assume, that the Florida Supreme Court's basis for a denial was on adequate state grounds. Therefore, this Court should grant certiorari as the federal constitutional rights of the Petitioner have been violated as shown in Petitioner's Writ of Certiorari filed in this Court.

CONCLUSION

Petition for Certiorari should be granted to determine whether the federal constitutional rights of Richard King have been violated.

Respectfully submitted,

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(305) 425-7676
Attorney for Petitioner

NO. A-348

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RICHARD KING,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent

CERTIFICATE OF SERVICE

I, WARREN H. EDWARDS, do hereby certify that I am a member of the Bar of the Supreme Court of the United States, and that I have served a copy of the Reply Brief of Petitioner, by depositing the same in the United States mail, first class postage prepaid, as follows:

MARK C. MENSER
Assistant Attorney General
125 North Ridgewood Avenue
Daytona Beach, Florida 32014

All parties required to be served have been served on this ____ day of March, 1984.

Warren H. Edwards, Esquire
Suite 101, Bradshaw Building
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Orlando, FL 32801

Attorney for Petitioner